Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

PONDEROSA DAIRY, PAHRUMP DAIRY, ROCKVIEW DAIRIES, INC., and DARRELL KUIPER and DIANE KUIPER d/b/a KUIPER DAIRY,

Petitioners,

v.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, and ROBERT TAD BELL, Undersecretary, Department of Food & Agriculture, State of California,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOHN H. VETNE
15 Powow St.
Amesbury, MA 01913
978-388-2480

RICHARD HESSE
Counsel of Record
2 White Street
Concord, NH 03301
603-228-1541

Attorneys for Petitioners

33pp

QUESTIONS PRESENTED

1. May a court fulfill its duty under the "clear statement" standard applicable to federal laws that would alter the Constitutional balance between state and federal governments by (a) drawing inferences of Congressional intent from statements of industry spokesmen in legislative subcommittee hearings predating the introduction of the proposed law in dispute, and (b) without examining the factual fit between the specific state regulatory scheme and specific language employed by Congress?

2 Is substantive judicial review of discriminatory effect under the Privileges and Immunities Clause foreclosed as a matter of law where state discrimination is facially based on the out-of-state location of a farm or business, but statute does not expressly refer to out-of-state "residency" or "citizenship"?

LIST OF PARTIES

The Petitioners are Ponderosa Dairy, Parhump Dairy, Rockview Dairies, Inc., Darrel and Diane Kuiper, d/b/a D.Kuiper Dairy. The Respondents are William J. Lyons, Jr., Secretary of the California Department of Food & Agriculture, and Robert Tad Bell, Undersecretary of the California Department of Food & Agriculture (hereinafter "CDFA").

CORPORATE DISCLOSURE STATEMENT

None of the corporate Petitioners have issued stock or securities that are publicly traded, and none of the petitioners have a corporate parent, subsidiary or affiliate that has issued publicly traded stock or securities

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PETITION FOR WRIT OF CERTIORARI

Ponderosa Dairy, Pahrump Dairy, Rockview Dairies, Inc., and Darrel and Diane Kuiper d/b/a/ D. Kuiper Dairy respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 9, 2001, rehearing and rehearing en banc denied on September 24, 2001. Review by this Court is in order because the Court of the Appeals decided important federal questions, with significant national economic impact, in a manner that conflicts with decisions of other circuit courts, conflicts with decisions of this Court, and represents a far-reaching departure from the accepted and usual course of judicial proceedings in matters of Commerce Clause and Privileges and Immunities jurisprudence.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 259 F.3d 1148 and is reprinted in the Appendix at A1-15,[1] The Order of the United States Court of Appeals for the Ninth Circuit denying Petitioner's request for rehearing and rehearing *en banc* is unreported and is reprinted in the Appendix at A59-60. The Opinion and Order of the United States District Court for the Eastern District of California granting summary judgment in favor of the Respondent and denying Petitioner's Motion for Summary Judgment is unreported and is reprinted in the Appendix to this Petition at A16-A22.

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[1] Citations to material printed in the Appendices appear herein as "A__." The Appendix is reproduced and attached to the companion petition in the matter of Hillside Dairy, Inc. v. Lyons, arising from the same 9th Circuit Decision.

JURISDICTION

Petitioners seek review of the ruling of the United States Court of Appeals for the Ninth Circuit, dated August 9, 2001, affirming the Order issued by the United States District Court of the Eastern District of California, granting California's motion for summary judgment and dismissing petitioners' complaint. The Ninth Circuit held that section 144 of the 1996 Farm Bill (Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 914-930 (1996) (codified as amended in scattered sections of 7 U.S.C.) (the "Farm Bill")) provided immunity to each of California's separately administered milk regulation programs from the dormant Commerce Clause, and the practical effect of the state's discrimination on out-of-state residents was not reviewable under the Privileges and Immunities Clause. On August 23, 2001, petitioners requested rehearing and rehearing *en banc* from the United States Court of Appeals for the Ninth Circuit. By Order dated September 24, 2001, the court denied this request. App. A59-60. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1), and Petitioners file this request for certiorari within the time allotted in accordance with Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

U.S. Const. art. I, § 8, cl. 3 (the "Commerce Clause") provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

U.S. Const., Article IV Section 2, and Amendment XIV, § 1, (the "Privileges and Immunities Clause") provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States"

Relevant excerpts from the Federal Agriculture Improvement and Reform Act of 1996 (Pub.L. No. 104-127 (Apr. 4, 1996), 110 Stat. 888 et seq.,Title I, Subtitle D, Chapter 1 – Dairy (§§ 141-152), *codified in part at* 7 U.S.C. §§ 7251-7259 (herein the "1996 Farm Bill"), are set forth in the Appendix at App A62-78. Excerpts from the milk "pooling" rules at issue are contained at App. 79-95

STATEMENT OF THE CASE

Individual states have made persistent efforts to use milk regulation to prop up local farm prices by insulating local markets from out-of-state competition. It has followed that a "large number of [this Court's] Commerce Clause cases arose out of attempts to protect local dairy farmers." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 n.22 (1994). This is another such case. The 9th Circuit, however, did not reach the merits of discriminatory and protectionist features of California's milk regulatory scheme under the Commerce Clause or Privileges and Immunities Clause, because it found instead that the Commerce Claims were barred by Congress and the Privileges and Immunities Claims were not cognizable because the state milk laws did not, on their face, differentiate against out-of-state residents.

I. The Petitioners' Business.

Petitioners operate dairy farms in the States of Arizona and Nevada. Darrel and Diane Kuiper are natural persons and proprietors of D. Kuiper Dairy, a farm in Buckeye, Arizona, where they reside. The Nevada dairy farms are Ponderosa Dairy, an operating unit of Rockview Dairies, a privately held California Corporation, and Pahrump Dairy, operated by a California partnership.

II. The Regulatory Setting.

California's dairy industry has been heavily regulated by the State of California since before the 1940's. These regulatory schemes are similar to federal regulation of the dairy industry in most of the other contiguous 47 states. Three different branches of the California Department of Food and Agriculture ("CDFA") administer three major state programs: (1) the Dairy Marketing Branch of CDFA administers the Milk Stabilization Plan through which minimum prices are established and enforced against processors of raw milk, (2) the Milk Pooling Branch administers a plan through which revenue from the sale of raw milk is pooled and distributed among California dairies, and (3) the Milk and Dairy Foods Control Branch enforces state compositional standards, labeling requirements and health requirements. App. A3-A5; CDFA, "*Welcome to California Milk and Dairy Foods Control*", www.cdfa.ca.gov/ahfss/mdfc/index.htm. In the federal system, the United States Department of Agriculture regulates minimum milk prices and oversees pooled revenue distribution to dairy farmers. 7 U.S.C. § 601 *et seq.* (The Agricultural Marketing Agreement Act of 1937); 7 C.F.R. Parts 1000-1199. The Food and Drug Administration, Department of Health and Human Services, oversees composition and health standards for milk and other foods under the Food, Drug and Cosmetic Act. *See* 21 C.F.R. Part 131. The FDA has explained that food composition or identity standards are consumer product "recipes."[2]

California's "quota" system for pooled milk revenue distribution and associated benefits are expressly limited by

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[2] Identity standards were developed under authority of the 1938 Food Drug & Cosmetic Act by "standardized recipes for such foods as dairy products, mayonnaise, ketchup, jelly and orange juice ..." Food & Drug Administration, The FDA Consumer, *Ingredient Labeling: What's in a Food?* (May 1993).

law to in-state farms. Calif. Food & Agric. Code § 62700 *et seq*. Until July 1,1997, California's pooling plan did not apply to milk from out-of-state dairy farmers. California processors could make payment directly to out-of-state dairy farmers, and did not have to pay a portion of the processors' minimum classified price obligation to the pool for blending and redistribution among California's dairy farmers.

In 1997, under pressure from members of the California dairy industry to deal with the out-of-state milk problem, CDFA undertook to amend the pooling plan, for the first time, to pool out-of-state milk (App. A4-5, A79-95). As of July 1, 1997, CDFA amended its minimum price regulation of out-of-state "other source" milk by requiring handlers to pay part of the price to the pool, and part to the out-of-state dairy farmer. (App. A89, § 900(d)). Thus, out-of-state dairy farmers were forced to share a portion of their revenue with their competitors -- California dairy farmers. Out-of-state dairy farmers continue to be barred, however, from enjoying the benefits of quota ownership, including the benefit of not having to incur transaction costs searching for the highest use buyer for their milk on a month-to-month basis. *See* App. A11-A12. CDFA now assigns the out-of-state milk a handler "credit" against the minimum regulated price that, by its design, restricts the out-of-state dairy farmer from ever attaining (or exceeding) the revenue enjoyed by California milk quota holders. More to the point, the record in the proceedings below (which the lower courts disregarded) demonstrate that the imposition of a pooling obligation on out-of-state milk has resulted in a dollar-for-dollar reduction in the price received by out-of-state dairy farmers on their sales of raw milk into California.

III. The Proceedings Below.

In June 1997 Ponderosa petitioners, along with Hillside petitioners in the separate companion case, brought suit against the Secretary and Undersecretary of the California Department of Food and Agriculture in the United States District Court for the Eastern District of California seeking injunctive and declaratory relief. The Ponderosa plaintiffs argued that the 1997 amendments to the California milk pooling regulations violated the dormant Commerce Clause, Equal Protection Clause and Privileges and Immunities Clause, because they illegally discriminated against out-of-state raw milk producers. (A5-A14). The Ponderosa and Hillside complaints were consolidated for purposes discovery and pretrial proceedings.

By Order dated July 21, 1999, the District Court granted summary judgment in favor of the defendants. The court did not reach the merits of the Commerce Clause claims. Instead, the court relied on the holding in *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177 (9th Cir. 1998). In *Shamrock*, the Ninth Circuit concluded that section 144 of the Federal Agriculture Improvement and Reform Act of 1996 ("Farm Bill") immunized, *inter alia*, California's pooling laws from scrutiny under the Commerce Clause because they contributed to the establishment or enforcement of its fluid milk standards with respect to packaged milk sold in California. *See Shamrock*, 146 F.3d at 1182.

On appeal in the case at bar, the 9th Circuit affirmed. Although the 1997 pooling amendments were not before the prior *Shamrock* panel, the *Ponderosa* panel in this case deemed that it was bound by Judge Reinhart's opinion in *Shamrock*. The court below, therefore, did not undertake an independent review of the legislative fit between the 1997 amendments and the text or context of §144 of the Farm Bill. Additionally, the court below expanded §144, construing that

provision as pertaining to laws that "affect" California milk composition standards (App A10) rather than to laws designed "to effect" those standards, as Congress wrote. Finally, the 9th Circuit ruled that Petitioners' Privileges and Immunities Clause claims could not be considered, as a matter of law, because farm location discrimination is beyond the reach of facial discrimination against out-of-state residents, to which the Clause is addressed. App. A14.

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the duty and limitations of federal courts when required to construe and apply a statute under this Court's exacting, but evolving, standard for a "clear statement" of legislative intent. It also presents an important opportunity for this Court to resolve conflict between the Ninth Circuit and decisions of the Third Circuit and this Court, concerning whether a state law that discriminates against non-residents in "practical effect," but is not discriminatory on the face of legislation, is subject to substantive judicial review under the Privileges and Immunities Clause.

As a very practical matter, what this Court may do or not do will affect the livelihood of every dairy farmer in the nation, for better or worse. Farm milk prices in USDA's milk marketing order system are directly based on the market value of unregulated milk commodities – cheese, butter and milk powder. 7 C.F.R. §§ 1000.50-54. These commodity prices are highly responsive to supply and demand. Even a relatively small increase or decrease in national milk production will produce a significant change in commodity prices, and therefore farm milk prices.[3]

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[3] In 2000, national milk production increased by 3% over the prior year, but dairy farmer cash receipts, at $20.6 billion, were 11% ($2.6 billion) below 1999 income levels. National Agricultural Statistics Service,

There is, perhaps, no area of interstate trade in agriculture where the impulse of state governments to protect local farmers is stronger than the milk industry. *See, West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 n.22 (1994). The ability of California to insulate itself from the national market as a result of the lower court's decision, to shift the burden of surplus production across its state lines, or to protect its fluid market for benefit of local farmers, is of no small consequence to farmers from Arizona to Minnesota and New Hampshire. As detailed below, the lower court's reliance on inference from remote "legislative history" to shield California's milk industry from Commerce Clause constraints, and its miserly approach to practical effect of California protectionism on residents of neighboring states, deserve review by this Court.

I. There Is a Compelling Need for Guidance by This Court To Further Instruct Lower Courts Concerning Application of the "Clear Statement" Standard When Applied To Alter the Balance Between Federal and State Governments.

The "clear statement" standard for discerning the statutory intent of Congress has been developed by this Court

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USDA, *Milk Production, Disposition, and Income, 2000 Summary* (April 2001). California is the Nation's largest milk producing state, and accounts for over 18% of the nation's cheese production, 28% of U.S. butter production, and 49% of U.S. milk powder production (*Milk Production, supra*; California Department of Food and Agric., *California Dairy Stats. 2000 Annual* (T.16-17)(2001)(http://www.cdfa.ca.gov/dairy); National Agricultural Statistics Service, USDA *Dairy Products* (Da 2-6, Feb. 2001). California recognizes the influence of its milk market on the national market: "Extraordinary milk production in all of the major milk production regions (particularly in the states west of the Rocky Mountains) has been a major contributor to low commodity prices." Dairy Marketing Branch, California Department of Food and Agriculture, *Riding the Milk Price Rollercoaster* (November 1999), http://www.cdfa.ca.gov/dairy/page4.html.

to be applied by subordinate courts faced with a limited class of legislation -- most notably laws that would "alter the 'usual constitutional balance between the States and the Federal Government.'" *Will v. Michigan Dept. of State Police*, 491 U. S. 58, 65 (1989)(citation omitted). This line of authority includes cases involving exemption of states from the Union-binding force of the dormant Commerce Clause, *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984) (plurality opinion); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982); abrogation of state sovereign immunity when necessary to protect 14th Amendment liberties, *Atascadero State Hospital v. Scanlon*, 473 U. S. 234, 242 (1985); interference with the state electoral process, *Gregory v. Ashcroft*, 501 U. S. 452, 460-461 (1991); and preemption of states' historic police powers, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

The "clear statement" standard has been defined as simply requiring a statutory application that is "plain to anyone reading the Act..." and no more. *Gregory v. Ashcroft*, 501 U.S. at 467. This practical rule assures that in the political process not only Congress, but also the President in signing a law into effect, acted intentionally to alter the constitutional balance. As revealed in the decisions by the 9th Circuit below, it has sometimes proved difficult to "keep it simple" in this evolving area of jurisprudence.

Because of its importance to the Constitutional balance, this court's opinions -- majority, plurality, dissenting, and concurring -- have frequently struggled to maintain integrity of the "clear statement" rule, *e.g.*, *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000)(in which the majority opinion by Justice O'Connor and the opinion by Justice Thomas, dissenting in part, both address the requirements of a "clear statement" standard, although the

issue was not necessary to disposition of the case); *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 209 (1991)(O'Connor, dissenting, cautioning that "the clear statement rule is not a mere canon of statutory interpretation. Instead it derives from the Constitution itself"). Some of this Court's opinions have eschewed any reliance on legislative history, *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989)("congressional intent must be both unequivocal and textual"), while others have looked to legislative history at least to confirm the direction of the plain language of statutory text. The decisions of the 9th Circuit, as described below, provide compelling reason for this Court to address the outer limits of permissible reliance (if any) on extra-statutory inferences of legislative intent under the "clear statement" test.

a. The Court of Appeals did not faithfully apply the "clear statement" rule to the text of § 144 of the 1996 Farm Bill.

The 9th Circuit's opinion in *Ponderosa* directs the reader to Judge Reinhardt's *Shamrock* opinion as containing all the analysis required to conclude that the 1997 milk pooling rules challenged by the dairy farmer plaintiffs are immune from Commerce Clause scrutiny. App. A7-8. According to the court, *Shamrock* controls all milk pooling rules the State of California may devise, because "at least some of the pricing and pooling regulations were directly at issue" in that case. App. A10. The court rejected the notion it was relying on dicta rather than the holding of *Shamrock*. *Id.*[4]

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[4] The danger of overreaching in a grasp for prior holdings to avoid substantive adjudication on the merits was adroitly explained by the Seventh Circuit: "to give the inessential parts of an [earlier] opinion the force of law would give Judges too much power, and of an *essentially legislative character*." *Wilder v. Apfel*, 153 F.3d 799, 803 (7th Cir. 1998)(emphasis supplied).

The 9th Circuit's decision in *Ponderosa* reveals that there is a need for this Court to make abundantly clear that the danger of judicial encroachment on legislative prerogatives is at its nadir when confronted by "clear statement" rules of construction applicable to federal laws that would alter the traditional balance between federal and state powers. We turn first to the facts and holding of *Shamrock*.

Shamrock's complaint was dismissed under Rule 12(b) for failure to state a claim based on "the facts alleged in the complaint," which were assumed to be true for purposes of review. App. A26-27. The regulatory facts to which Shamrock's complaint directed the court's attention were two-fold. The first involved "various California regulations that govern the composition of consumer milk," referred to in FDA and state regulatory parlance as "identity standards." App. A25. California requires fortification, with milk solids, of consumer milk products. *Id.* Also involved were regulations that Shamrock's complaint called the "pricing and pooling laws." These allegations were summarized by the *Shamrock* panel to set the stage for its decision as follows: "California also provides its milk processors with a fortification allowance, which reduces the cost of standardizing the milk. Shamrock asserts that California processors receive a competitive advantage against out-of-state processors because California only gives the fortification allowance to in-state processors." *Id.* It was in this factual context that the 9th Circuit ultimately concluded that Congress not only authorized California to avoid uniform milk standards applicable to the rest of the country, but it also authorized the state to further tip the competitive playing field by administering a subsidy to in-state processors, offsetting their costs of meeting the composition standard. The *Shamrock* panel reasoned:

> Although § 144 of the Farm Bill does not specifically refer to these laws, as it does to

> the milk composition standards, we conclude that the pricing and pooling provisions fall under the ambit of the prohibition against indirect limitations on laws, regulations, or requirements regarding milk standards. As we have noted, the various elements of the milk fortification scheme are interrelated and mutually interdependent.

Id. at A34. The *Shamrock* holdings did not address milk rules adopted for reasons other than composition standard compliance.[5]

In short, the facts regulatory upon which the Ponderosa and Hillside plaintiffs relied were very different from those in *Shamrock*. *Shamrock* involved application of

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[5] To reach its conclusion of Congressional intent, the *Shamrock* Panel relied on a purported concession of Shamrock's counsel, and statements of California industry representatives in a subcommittee hearing about one year before the Farm Bill was enacted, and ten months before Section 144 first surfaced behind the doors of the House and Senate Farm Bill Conference Committee. App. A34. No history is cited, or available, from the Commerce Committees of the House or Senate, which have jurisdiction over the Food, Drug and Cosmetic Act, which contains the preemption clause California was seeking to avoid. See. App. A28, 46. The *Shamrock* opinion included the following subsidiary and necessary statutory interpretations to reach its "clear statement" holding about the reach of Section 144 of the Farm Bill (App. A29 –30): 1) that the phrase "this act or any other provision of law" clearly and unambiguously means the subject Farm Bill, the Food, Drug and Cosmetic Act, and all Constitutional powers that Congress may waive; 2) that the phrase "directly or indirectly" clearly and unambiguously modifies the prohibited reach of federal Commerce Clause limitation as well as the expanse of the state's authority, and 3) that the fortification allowance, referred to by Shamrock as a "pricing and pooling law," was clearly included by Congress within the reach of Section 144's protection, as an indirect means "to effect" the state's fluid milk composition and labeling requirements, and is therefore also immune from Commerce Clause scrutiny.

rules to fluid milk processors (bottling plant operators); *Ponderosa* complained of rules applicable to producers (dairy farmers). *Shamrock*'s attack on "pooling and pricing laws" was directed at the fortification allowance paid or credited to processors in the state Milk Stabilization Plan; the Ponderosa and Hillside plaintiffs challenged the state's distribution of raw milk revenues between dairy farmers under the Pooling Plan. The rules at issue in *Shamrock* were exclusively focused on fluid milk – i.e., milk used for packaged consumer milk products; the Pooling Plan redistributes revenue from all uses of raw milk, including 80% of California dairy farmers' milk production used for manufactured products such as cheese, butter, milk powder, ice cream, yogurt, and sour cream which § 144 of the 1996 Farm Bill does not address in any way. The 1997 pooling rules were not in existence in September 1996 when the district court dismissed Shamrock's complaint for failure to state a cause of action. App. A38. So *Shamrock*'s extension to the 1997 pooling amendments would credit the *Shamrock* court with deciding a Constitutional issue on facts not before the *Shamrock* court.

Purporting to follow *Shamrock*, the *Ponderosa* court did not undertake to apply the "clear statement" rule of statutory construction to the 1997 pooling regulations before it by measuring the "fit" of the contested regulations to the text and context of § 144 of the Farm Bill. Instead, it begged the question, relying on *Shamrock's* application of the "clear statement" rule to a set of very different regulations. Nor did the *Ponderosa* court even attempt to find a fit between the 1997 pooling regulations and reasoning of the *Shamrock* panel – that the "pricing and pooling" laws contested by Shamrock were protected because application of the Commerce Clause to them would constitute "indirect limitations on laws, regulations, or requirements regarding milk standards." App. A34.

Nor could the *Ponderosa* court have concluded, *sub silentio*, that the 1997 milk pooling regulations served in an indirect manner to advance enforcement or compliance with consumer fluid milk composition standards. Although California's Food and Agriculture Code includes generic reference to "standards of content and purity" as one of many legislative purposes for milk regulation (App. A8, *quoting from* Cal. Food & Agr. Code § 61802(c)), the Secretary of Food and Agriculture's Statement of Determination and Order did not find that the contested pooling rules were necessary as an indirect means of promoting the composition standards. App. A8-9.

Indeed, the assertion that the pooling amendments had an indirect relationship with the composition standards was advanced for the first time only by counsel for the Secretary, in the course of litigation, two years after the agency's rulemaking decision. This is not the sort of rationale this Court will ordinarily accept for agency action. *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157 (1991). Even the State's litigation assertion, adopted by the *Ponderosa* court to capture Commerce Clause immunity, only claimed, at best, that the raw milk pooling amendments somehow indirectly *affect* fluid milk. Neither the State's litigation arguments nor the court's conclusions describe how the amendments served to promote enforcement or compliance with composition standards for fluid milk products. The *Ponderosa* court said:

> Ponderosa and Hillside also contend that Shamrock is inapposite because § 144 only affects California's ability to regulate standards for "fluid milk products sold at retail or marketed in the State of California" [quoting Conference Committee report], as opposed to raw milk. Hillside's argument is unpersuasive because § 144 applies to "any

> provision of law" that "directly or indirectly" has an effect on fluid milk. Raw milk and fluid milk are closely related. It follows that the 1997 amendments which directly affect raw milk, indirectly affect fluid milk.

App A9-10.

In this analysis, the lower court both expanded *Shamrock* and edited the words of § 144 of the 1996 Farm Bill. The Farm bill shields California from construction of federal laws that would limit the State's authority "to establish *or continue to effect* any law, regulation, or requirement regarding" fluid milk standards and labeling. App. A39, emphasis provided. The verb "to effect" means to bring about; to achieve; to make it so. The *Ponderosa* court effectively rewrites the text of § 144 as though Congress used the word "affect" in the sense of influencing or being influenced by.

In short, the *Ponderosa* court turned the "clear statement" rule on its head, looking deferentially and inaccurately at the broad meaning of words used in *Shamrock* opinion to shield the 1997 pooling amendments from Commerce Clause scrutiny, rather than looking to the words of Congress for the requisite clear and unambiguous expression of legislative intent to allow the amended pooling rules to apply without regard to the impact on interstate commerce. The lower court's conclusion, that "all of California's milk pricing and pooling laws" enjoy blanket protection from Commerce Clause scrutiny (App. A7), represents not a faithful exercise of statutory construction, but rather an impermissible act of judicial legislation.

b. The Court of Appeals did not faithfully apply the "clear statement" rule to the context of § 144 in the 1996 Farm Bill.

Of course, a "clear statement" may be found, or ruled out, in statutory context if not expressly contained in specific statutory text. *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 477 (1977), *quoting Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976). Neither *Ponderosa* nor *Shamrock* undertook to reconcile § 144 with other provisions of the Dairy Title of the Farm Bill set forth in App. 63a-79a. In this failure to look beyond the limited text of § 144, the two 9th Circuit opinions also operate in tension with additional directives of this Court. Other provisions of the Farm Bill, if examined, preclude the expansive reading given to §144 by the 9th Circuit.

Farm Bill §143(a)(2), for example, specifically addresses California's "quota" system, which the *Ponderosa* court recognized as the foundation of State's Pooling Plan. App. 3a-5a. In this section, Congress gave express federal protection to the quota system *if* California elected to participate in the reformed (and more uniform) Federal Milk Order system of milk price regulation. Section 145 expressly prohibits state milk pricing plans from employing an excessive manufacturing allowance for milk used in cheese, butter and milk powder. These adjacent provisions preclude a conclusion that Congress unambiguously gave blanket Commerce Clause exemption to California's pooling scheme in § 144.

In § 147, Congress gave express temporary approval for New England states to regulate some milk prices, conditioned, among other things, on how milk revenue is shared among farmers and precluding trade barriers. §147(7). Congress understood in section 147, as in sections 143 and 145, how to make reference to milk pricing and pooling laws.

The "clear statement" rule is not honored in this context by a conclusion that where Congress made no reference whatsoever to milk pricing and pooling laws in §144, it intended to provide California with blanket and perpetual Commerce Clause exemption without regard to trade barriers or inequity in revenue distribution between dairy farmers.

In §§ 148 and 149, Congress repeatedly expressed its objectives to operate the U.S. dairy program in a manner "consistent with the obligations of the United States as a member of the World Trade Organization." Yet, if *Ponderosa* and *Shamrock* are fully applied to extend "any other provision of law" to Congress' commerce powers, California is free to disregard the negative constraints of the foreign commerce clause, as well as the domestic commerce clause, and to interfere in the federal government's dealings with foreign powers in dairy trade matters.

In declining to undertake any examination of the contested rules against the statutory text as well as context of §144, the 9th Circuit opinion in *Ponderosa* expanded on the broad holding of Judge Reinhardt in *Shamrock*, and failed to conform to this Court's directives of what is required for "clear statement" statutory construction.

II. There Is a Compelling Need for This Court To Reaffirm that State Discrimination Against Out-of-State Residents In Practical Effect, As Well as on the Face of State Law, Is Subject to Judicial Review Under the Privileges and Immunities Clause.

The 9th Circuit's decision is in conflict with law expressed by this Court and sister Circuits that the "practical effect" of a state classification on non-residents, not just its facial differentiation based on citizenship or residency, may be adjudicated in a Privileges and Immunities claim. The court held that the Privileges and Immunities Clause may be

invoked only where a state's discriminatory classifications, "*on their face*, ...[are] based on any individual's residency or citizenship" (App.A14, emphasis supplied). Accordingly, the court affirmed the trial court's dismissal of plaintiffs' Privileges and Immunities claim because the California's milk pooling scheme at issue facially differentiates among dairy farmers based on in-state or out-of-state farm location (*id.)*, not expressly on the basis of the farmer's residence. Accordingly, the 9th Circuit invites clever and disingenuous wording of state laws as a means to circumvent substantive review under the Privileges and Immunities Clause.

It is difficult to conceive of an occupational calling in which the location of the business and the residence of the business operator, like Arizona family farmers Darrel and Diane Kuiper in this case, are more closely tied than that of farming. The most recent Census of Agriculture reveals that 93% of reporting dairy farm operators reside on the farm they operate. U.S. Department of Agric., *1997 Census of Agriculture*, (http://www.nass.usda.gov/census/), Table 51 (Operator Characteristics). By targeting farm location for differential treatment, plaintiffs argued that the California scheme has the practical effect of discriminating against out-of-state farm residents.

It is by now well established that the Privileges and Immunities Clause protects individuals from state-sponsored discrimination in the pursuit of occupational callings or disposition of privately held property on the basis of out-of-state residency or citizenship. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985); *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978). "[I]t was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." *Toomer v. Witsell,* 334 U.S. 385, 396 (1948) (citations omitted)).

Further, an occupational calling, such a dairy farming, is one of the "fundamental" rights protected by the Privileges and Immunities Clause. *United Building and Constr.*, 465 U.S. at 219. *Supreme Court of New Hampshire v. Piper*, 470 U.S. at 281. Fundamental rights "are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. Little Rock*, 361 U.S. 516, 523 (1960).

This Court has never held that the Clause guards the rights of citizens only against facial discrimination based on state residency. *See*, *United Building and Construction Trades v. Mayor*, 465 U.S. 208, 216-18 (1984)(The Privileges and Immunities clause protects out-of-state citizens against discrimination based on municipal residency, even if some in-state citizens are also burdened by the rule); *See, Lunding v. New York Tax Appeals Tribunal*, 522 US 287 (1998)(emphasizing need to analyze "practical effect" of state tax law applied to out-of-state residents under Privileges and Immunities jurisprudence.

The 9th Circuit panel expressly acknowledged that it deemed the justiciability of the Privileges and Immunities question to turn on whether there was a Constitutional distinction between facial classification and practical effect. App. A13-14.

While state discrimination against residents or citizens of another state is an essential element of a Privileges and Immunities claim, this Court has never held that the Clause may be invoked only when residential discrimination appears on the face of a state law. There is not, however, the same wealth of jurisprudence defining "discrimination" under this Clause as there is for its more frequently-invoked constitutional cousins, the Commerce Clause and the Equal Protection clause – both of which allow claims of discrimination under a law "as applied" or by "practical

effect" where discrimination is not apparent on its face. This Court has, however, repeatedly instructed that courts should consider the common Constitutional bond between the Privileges and Immunities Clause and the Commerce Clause in the Founder's objectives to "promote[] interstate harmony" and "to create a national economic union." *Supreme Court of New Hampshire v. Piper*, 470 U.S. at 279-80. Indeed, in *Hicklin v. Orbeck*, 437 U.S. 518 (1978), this Court counseled that...

> ...the mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, 2, and the Commerce Clause - a relationship that stems from their common origin in the Fourth Article of the Articles of Confederation 16 and their shared vision of federalism, see Baldwin v. Montana Fish and Game Comm'n, 436 U.S., at 379 -380 - renders several Commerce Clause decisions appropriate support for our conclusion.

Id. at 531-32.

As used in the instructive and analogous Commerce Clause context, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality of the State of Oregon*, 511 U.S. 93 at 99 (1994). Further, commerce discrimination is not limited to the face of a state law, as the 9th Circuit panel would limit it in a Privileges and Immunities context. Such discrimination may take any of three forms: first, the state statute may facially discriminate against interstate or foreign commerce; second, it may be facially neutral but have a discriminatory purpose; third, it may be facially neutral but have a discriminatory effect. *West Lynn Creamery*, 512 U.S. at 201 (directing inquiring courts to look

for discriminatory "purposes and effects); *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)(state statute may discriminate "either on its face or in practical effect"); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977); *SDDS, Inc. v. State of S.D.* 47 F.3d 263, 267 (8th Cir. 1995) (listing the three types of discrimination and citing cases illustrating each).

As summarized in *Maine v. Taylor*, 477 U.S. 131 (1986):

> [O]nce a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means.

Id., at 138 (citations omitted). Conforming to Commerce Clause – Privileges and Immunities Clause parallelism, the test described in *Maine v. Taylor* is similar to the test summarized in *New Hampshire Supreme Court v. Piper* applied to discrimination based on residency. 470 U.S. at 284.

The Supreme Court most recently addressed the question of whether state milk price regulation violated the dormant Commerce Clause in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994). The analytic framework of Justice Stevens's majority opinion, which observed that the Court's decisions have not been "controlled by the form by which a State erects barriers to commerce. Rather, our cases have eschewed formalism for a sensitive, case-by-case analysis of purposes and effects." Id. at 201, *citing Best & Co. v. Maxwell*, 311 U.S. 454, 455-456 (1940)(noting that discrimination may be "forthright or ingenious," and the

Court has a duty to examine whether a state law is discriminatory in "practical operation.").

This Court has undertaken the same type of analytical approach under the Privileges and Immunities Clause. In *Chalker v. Birmingham & N.W. Ry. Co.*, 249 U.S. 522, 527 (1919), condemned a state law that differentiated between individuals based on location of a chief business office inside or outside of Tennessee:

> As the chief office of an individual is commonly in the state of which he is a citizen, Tennessee citizens engaged in constructing railroads in that state will ordinarily have their chief offices therein, while citizens of other states so engaged will not. Practically, therefore, the statute under consideration would produce discrimination against citizens of other states by imposing higher charges against them than citizens of Tennessee are required to pay.

The "practical effect" principle honored in *Chaulker's* substantive review of a Privileges and Immunities challenge was followed much more recently in *Tolchin v. Supreme Court of New Jersey*, 111 F.3d 1099 (3d Cir. 1997), cert. denied, 522 U.S. 977 (1997). *Tolchin* involved an attorney licensing rule, requiring a "bona fide office" within the State of New Jersey. The bona fide office location rule applied to all attorneys, in-state and out-of-state, and was adopted to replace facially discriminatory rules that differentiated between residents and non-residents. The court nevertheless felt bound to examine whether the facially neutral rule produced a "discriminatory effect on nonresidents." Applying conventional Privileges and Immunities analysis, the court concluded...

> ...that the bona fide office and mandatory attendance requirement do not impose a disproportionately heavy burden on nonresidents. These requirements bear a substantial relationship to New Jersey's goal of regulating the practice of law to the benefit of the public and are not overly restrictive of attorneys. Thus, these requirements do not violate the Privileges and Immunities Clause.

111 F.3d at 1109-11.

The practical effect of farm location discrimination in this case is not analytically distinguishable from the business location rules reviewed on the merits for "practical effect" on non-residents in *Chaulker* and in *Tolchin*. The 9th Circuit's *Ponderosa* decision expands the current boundaries of a state's ability to discriminate against non-residents by ingenious rather than forthright devices. This Court's guidance is once again necessary to define the parameters of discrimination tolerated by the Privileges and Immunities Clause and to resolve the conflict between the 3rd Circuit and the 9th Circuit.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Richard Hesse, Esq.*
2 White Street
Concord, NH 03301
603-228-1541

John H. Vetne, Esq.
15 Powow St.
Amesbury, MA 01913
978-399-2480
*Counsel of Record

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Supreme Court of the United States

HILLSIDE DAIRY, ET AL.,

Petitioners,

v.

WILLIAM J. LYONS, JR., ET AL.,

Respondents.

PONDEROSA DAIRY, ET AL.,

Petitioners,

v.

WILLIAM J. LYONS, JR., ET AL.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CONSOLIDATED BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

STEEFEL, LEVITT & WEISS
A Professional Corporation
ANDREA HACKETT HENNINGSEN
One Embarcadero Center,
30th Floor
San Francisco, CA 94111
Telephone: (415) 788-0900

BILL LOCKYER
Attorney General of the
State of California
MANUEL M. MEDEIROS
State Solicitor General
RICHARD M. FRANK
Chief Assistant Attorney
General
BRUCE F. REEVES*
Deputy Attorney General
**Counsel of Record*
1300 I Street
P.O. Box 944255
Sacramento, CA 95244-2550
Telephone: (916) 323-1996
Fax: (916) 324-8835

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly held that Congress, by enacting Section 144 of the Farm Bill of 1996, has exempted provisions of California's milk pooling and pricing regulations from challenge under the Commerce Clause.

2. Whether the Petitioners state a claim under the Privileges and Immunities Clause, when it appears on the face of the complaint that the Petitioners suffered no disability based upon their residency or citizenship.

PARTIES

The Petitioners in *Hillside Dairy, et al. v. Lyons*, docket number 01-950, are Hillside Dairy, Inc., A&A Dairy, L&S Dairy, and Milky Way Farms (hereinafter "the *Hillside* Petitioners"). The Petitioners in *Ponderosa Dairy, et al. v. Lyons*, docket number 01-1018, are Ponderosa Dairy, Pahrump Dairy, Rockview Dairies, Inc., Darrel and Diane Kuiper, dba D. Kuiper Dairy (hereinafter "the *Ponderosa* Petitioners"). The *Hillside* and *Ponderosa* Petitioners are collectively referred to as Petitioners.

The Respondents in both cases are William J. Lyons, Jr., Secretary of the California Department of Food and Agriculture, and Robert Tad Bell, Undersecretary of the California Department of Food and Agriculture (hereinafter "Respondents"). Respondents are hereby opposing the petitions in both cases in this single brief in opposition.

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STATEMENT

There is no reason to grant certiorari in these cases. The Court of Appeals' decision properly applies settled rules of law to a specific statute of limited application, and does not conflict with any decisions of the other circuits. The decision in *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177 (9th Cir. 1998), *cert. denied*, 525 U.S. 1105 (1999), controlled the decision below, and Petitioners' attempts to limit Section 144's broad exemption from the Commerce Clause should be addressed to Congress.

Petitioners rely on broad, unsupported assertions that this Court's failure to grant certiorari will negatively impact the nation's milk industry. Not only is there no threat of national importance, the subject provisions, on their face and in application, provide out-of-state producers benefits not enjoyed by their California counterparts, and therefore do not impose any burden on interstate commerce. Petitioners' disagreement with the Court of Appeals' analysis, and their desire to roll back the 1997 amendments to garner even more regulatory favoritism, are not enough to warrant this Court's grant of certiorari. The 1996 Farm Bill's plain and sweeping language demonstrates Congress' unmistakable intention to empower California to continue in effect its fluid milk standards and all laws or regulations directly or indirectly related thereto, including its pricing and pooling programs, as recognized by the *Shamrock* court.

I. California's Commerce Clause Exemption In The 1996 Farm Bill

On April 4, 1996, President Clinton signed into law the omnibus Federal Agriculture Improvement and Reform Act of 1996, also known as the 1996 Farm Bill. *See* 110 Stat. 888 (1996), Pub. L. No. 104-127. (Title I of the Act, containing Section 144, was entitled the Agriculture Market Transition Act.) Section 144 of the 1996 Farm Bill states as follows:

> Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, *directly or indirectly, to establish or continue to effect* any law, regulation, or requirement regarding –
>
> (1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or
>
> (2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

7 U.S.C. § 7254 (emphasis added). Contrary to the Petitioners' characterization, Section 144 does not merely save California's fluid milk standards from preemption. Congress' sweeping language exempts California's interrelated milk pooling and pricing provisions that work as a means of "effecting" California's fluid milk standards.

II. California's Fluid Milk Laws

In order to moderate the often-volatile forces that historically have affected the production and marketing of milk, and to ensure a stable milk supply, both the

federal government and many states, including California, established milk marketing and milk pooling programs for specific geographic areas. *See* 7 U.S.C. § 601; Cal. Food & Agric. Code §§ 61801, 61802, 62700-62702, Respondents' Appendix at App. 1-7.[1]

Raw milk consists of three components: fat, solids-not-fat (protein, calcium, and lactose, for example), and fluid carrier (primarily water). California's Stabilization and Marketing Plan sets a price for each milk component depending on the class of products the processor creates with the milk. The program classifies milk products into five categories, from fluid milk ("Class 1") to cheese ("Class 4b").

Before pooling, a significant number of milk producers (dairy farmers) seeking the high prices placed on Class 1 milk sometimes engaged in destructive trade practices, agreeing to "supply" contracts with Class 1 fluid milk processors who would demand monetary concessions from the producer in return. To address such destructive trade practices, California passed the Gonsalves Milk Pooling Act of 1967, Cal. Food & Agric. Code sections 62700 *et seq.*, Resp. App. 3 *et seq.* The goal of pooling under the Act was simple: Milk producers would pool their revenue to eliminate the destructive trade practices that appeared in the industry. Cal. Food & Agric.

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[1] Relevant excerpts of California's Food and Agricultural Code, and its Pooling Plan for Market Milk, As Amended Effective July 1, 1997, are attached in Respondents' Appendix.

Code § 62701, Resp. App. 3-4. The pool would account for revenues received from processors such that California producers would receive blended prices, based on the entire pool's milk usage.

California's system establishes two milk prices for California producers: a "quota" price, and a "base/overbase" price. Cal. Food & Agric. Code § 62711, Resp. App. 6. "Quota" refers to an allocation a California producer may hold based on historic or increased Class 1 milk production, or the purchase of quota from other producers. Cal. Food & Agric. Code § 62703, Resp. App. 5. A producer's "quota" allocation entitles the producer to receive a higher price for a certain amount of milk. "Overbase milk" is milk that is produced in excess of the amount of milk designated as "quota milk." Many California producers own no quota at all, and receive only the "overbase" price for their milk.

A. Pooling Prior to the Amendments

Under most pooling plans, including California's, funds are not collected from all milk processors and then redistributed to milk producers. A processor is charged an "in-plant blend price" based on the end use to which that processor's milk is put, and the minimum prices for each of those products. This in-plant blend price is then multiplied by the total amount of raw milk that the processor has received from its producers to yield a processor's "gross pool obligation." Amended Pooling Plan for Market Milk, Article 9, sections 900(a), (b), Resp. App. 7.

Processors pay each of their California producers based on the quota and base/overbase prices. Processors receive a credit against their gross pool obligation equal to the minimum total amount that they must pay their California producers. If a processor's gross pool obligation is higher than the credit, which typically happens to Class 1 processors, then the processor pays the difference (net pool obligation) to the pool. Conversely, if a processor's gross pool obligation is less than the credit, then the processor receives monies from the pool which it can use to pay its producers.

Formerly, California milk processors who received raw milk from producers outside of California received credit at the in-plant blend price. Because a processor's pool obligation was equal to the in-plant blend price, processors by definition could not owe any amount to the pool on account of such milk. The mathematical effect of the Department's accounting procedures was to credit California processors receiving raw milk from out-of-state as though they had paid the full in-plant blend price to obtain it. By contrast, processors incurred a pool obligation (equal to their in-plant blend price) for California raw milk, for which these Class 1 processors only received a credit no greater than the quota price, which was typically less than their in-plant blend price. Therefore, for Class 1 milk processors, out-of-state producers were treated substantially better than their California counterparts, because the pooling credits effectively placed a higher value on out-of-state milk than milk produced in the state.

In particular, this regulatory loophole created an incentive for out-of-state dairies to selectively ship milk

to Class 1 processors in California, or to "cherry pick" this portion of the market. Petitioners relied upon this discrimination in their favor to bargain for higher prices than were available to California producers while increasing their production insulated from competition. Some producers went so far as to move their dairy operations from California to Nevada, selling their California quota in the process. Others opened new dairies out-of-state in addition to their in-state dairies. This loophole was so large, some California producers and producer cooperatives began to take advantage by intentionally shipping raw milk out of the State and then immediately returning the same amount to California to generate substantial profits.

Because of the inherent unfairness of the pre-amendment regulatory structure, on September 25, 1996, certain milk producers petitioned the California Department of Food & Agriculture to amend the Pooling Plan to eliminate the loophole favoring out-of-state producers and ensure that the California regulatory system treated all milk more evenhandedly.

B. The Amended Pooling Plan and Interstate Commerce

Under the Amended Pooling Plan, Class 1 processors who acquire and process out-of-state raw milk receive a credit against their gross pool obligation which, under usually-applicable market conditions, is better than the credit they would have received had the milk been produced in-state. The credit is equal to the lower of the processor's in-plant blend price or the quota price. Since

a Class 1 processor's quota price is almost always lower than the in-plant blend price, Class 1 fluid milk processors will almost always receive a credit at the quota price for their use of out-of-state milk. Crediting the processor at what is usually the highest level available can still entail significant incentives to the California processor to acquire milk from out-of-state. Moreover, the out-of-state milk is credited at the quota price even though the out-of-state producer supplying the milk has not had the expense of purchasing quota.

Out-of-state producers are free to compete with in-state producers by negotiating any price for their Class 1 milk within the State of California, including a price below the quota price, and processors have an incentive to acquire such milk because they receive a credit against their pool obligation for this out-of-state milk at the full quota price, under typical conditions. Thus the amended pooling plan still preserves incentives for processors to acquire milk from out-of-state producers, while discouraging the incentive for in-state producers to send their milk on artificial "round trips" outside the state to obtain the beneficial treatment given to out-of-state milk prior to the amendments.

Contrary to Petitioners' repeated representation that the 1997 pooling plan amendments have resulted in "a dollar-for-dollar reduction in the price received by out-of-state dairy farmers on their California raw milk sales," the amended pooling plan does not dictate what price out-of-state producers receive for their milk. Instead, out-

of-state producers may freely negotiate with California processors for their in-state milk sales.[2]

The amendments effectively achieved their primary purpose, to discourage the round-tripping of milk. The exportation of milk decreased immediately following the amendments of July 1, 1997, in close proportion to an immediate decrease in imports. Indeed, when factoring out "round-tripped" milk, the importation of milk has increased above pre-amendment levels. This proves that, far from erecting a barrier to trade, the amendments have continued to encourage the importation of milk into California.

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[2] Missing from the petitions is any mention of the fact that producers in both cases have contracted away their ability to negotiate for the price of their milk. The Hillside Petitioners are four northern Nevada dairy producers, who were until recently members of California Gold ("Cal Gold"), a California dairy cooperative. Cal Gold recently merged with Dairy Farmers of America ("DFA"), a national cooperative with over 18,000 members. The Hillside Petitioners entered into membership agreements with Cal Gold, now assigned to DFA, requiring them to market all of their milk through their cooperative. The Ponderosa Petitioners are also part of a cooperative. The Ponderosa Petitioners are two southern Nevada milk producers (Ponderosa Dairy and Pahrump Dairy), a California corporation which owns dairy farms in Nevada and California and a dairy processing facility in California (Rockview Dairies, Inc.), and an Arizona milk producer (D. Kuiper Dairy). These out-of-state dairies also marketed their milk through a cooperative, Security Milk Producers. Thus Petitioners have ceded their right to negotiate the price and destination of their milk to their cooperatives.

II. The Proceedings Below

Petitioners alleged below that the 1997 amendments are preempted by the Commerce Clause, and that they discriminate against out-of-state milk producers in violation of both the Equal Protection Clause and the Privileges and Immunities Clause. Pet. App. A3.

The district court granted the Defendants' motion to dismiss both the equal-protection claim and the privileges-and-immunities claim. Pet. App. A5. Defendants moved for summary judgment on the commerce-clause claim, and that motion was also granted. Pet. App. A21. Plaintiffs appealed and the appeals were consolidated for decision.

The Ninth Circuit first addressed Petitioners' claim that 1997 amendments to the Pooling Plan violate the Commerce Clause. The panel concluded, as did the district judge, that Petitioners' commerce-clause claim was identical to the claim previously considered and disposed of by another panel in *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177 (9th Cir. 1998), *cert. denied by Shamrock Farms Co. v. Veneman*, 525 U.S. 1105 (1999). As it had in *Shamrock Farms*, the State argued that the intended sweep of Section 144 of the 1996 Farm Bill, 7 U.S.C. § 7254, encompassed California's pooling plan. The Court of Appeals below agreed and affirmed the district court's grant of the State's motion for summary judgment. Pet. App. A5-A10.

The court also affirmed the district court's dismissal of Petitioners' equal-protection claim for failure to allege that the asserted discriminatory effect of the pool plan on out-of-state producers is unrelated to important state

interests. Pet. App. A10-A13. Petitioners had been given leave to amend, but chose not to avail themselves of the opportunity to correct their complaint. Pet. App. A12.

Finally, the Court of Appeals affirmed the district court's dismissal of Petitioner's claim under the Privileges and Immunities Clause. Noting that discrimination on the basis of a citizen's state of residency is essential to a claim under this provision of the Constitution, *Giannini v. Real*, 911 F.2d 354, 357 (9th Cir. 1990), the court rejected the complaint of unlawful discrimination because the classifications created by the pooling amendments are based on the location of the dairy herd and operation, not the citizenship or residency of the operation's owner. A14.

Petitioners have abandoned their claim that the 1997 amendments to California's pooling plan deprive them of equal protection of the laws. Petitioners seek review only of the lower court's dismissal of claims under the Commerce Clause claim and the Privileges and Immunities Clause. Neither Petitioner asserts grounds sufficient under Rule 10 to justify this Court's review.

ARGUMENT

PETITIONERS FAIL TO STATE GROUNDS SUFFICIENT UNDER RULE 10 TO WARRANT A GRANT OF CERTIORARI

A. Petitioners Offer No Data to Support Their Assertion That This Is a Case of National Significance

Petitioners in No. 01-1018 make the sweeping assertion that this Court's failure to grant certiorari "will affect the livelihood of every dairy farmer in the nation." Ponderosa Dairy Pet., p. 7. They protest that the decision below "is of no small consequence to farmers from Arizona to Minnesota and New Hampshire," Ponderosa Dairy Pet., p. 8, but no Minnesota or New Hampshire farmer is party to this action – or to any other action challenging the 1997 amendments. No facts are given to support Petitioners' exaggerations: nothing more than a vague, and rather disingenuous footnote, insinuating that California's amendments are responsible for the entire national drop in dairy-farmer cash receipts. Ponderosa Dairy Pet., p. 7 n. 3. Indeed, Petitioners cite, without apparent quarrel, California's 1999 assertion that "Extraordinary milk production in all of the major milk production regions (particularly in the states west of the Rocky Mountains) has been a major contributor to *low commodity prices.*" *Id.* (emphasis added). This is inconsistent with Petitioners' earlier, unsupported, suggestion that the 1997 amendments will result in *higher* commodity prices.

Petitioners in No. 01-950 also make the sweeping assertion that the decision below, "threatens to impose

costs and burdens that reach far beyond the interests of these Petitioners." Hillside Dairy Pet., p. 11. But again, no supporting facts are provided. These petitioners do point to statements made in an amicus brief to the effect that the 1997 amendments have resulted in a drop in Nevada dairy revenues. Hillside Dairy Pet., p. 12. But Respondents would suggest that any such reduction results from the loss of the pre-1997 *advantage* enjoyed by producers of out-of-state milk over California producers, rather than by any *disadvantage* vis-a-vis California producers. Furthermore, whatever these losses might be, they are shared by *California* owners of dairies located in Nevada. Ponderosa Dairy and Pahrump Dairy, petitioners in No. 01-1018, for example, are owned by a California corporation and partnership, respectively. Ponderosa Dairy Pet., p. 3.

In fact, as explained, California's amended pooling plan still operates to the unique benefit of out-of-state producers. Petitioners' vague, unsupported claims of a threatened national catastrophe are no more real than their own allegations of harm.

B. Petitioners' Commerce Clause Questions Do Not Satisfy Rule 10, But Merely Invite The Court to Review an Alleged Misapplication of The "Clear Statement" Rule by The Court of Appeals

Petitioners' questions are either misleading or fail to reveal a credible Rule 10 basis for certiorari. Petitioners in No. 01-950 frame their question so as to suggest that there is a conflict between the decision below and this Court's

decision in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). *See* Hillside Pet., p. i. But *Baldwin* has nothing whatsoever to do with construction of a federal statute regulating interstate commerce.[3] Petitioners in No. 01-1018 seek to have this Court resolve (a) an evidentiary question concerning the relevance or admissibility of proffered evidence of legislative intent, and (b) a question of the evidence to be considered by the court in discerning legislative intent. Ponderosa Pet., p. i. These are hardly compelling reasons for certiorari. S. Ct. R. 10 ("A petition for a writ of certiorari will be granted only for compelling reasons.") Petitioners in No. 01-1018 assert that "There Is a Compelling Need for Guidance by this Court to Further Instruct Lower Courts Concerning Application of the 'Clear Statement' Standard," Ponderosa Pet., p. 8, but their petition points only to the decision of the court below as "not faithfully apply[ing]" the "clear statement" standard. No other cases are cited as evidence of any confusion among the lower courts on this point, such as might require this Court's "guidance."

Moreover, there is no evidence that the circuit court is unclear about the need to find a "clear statement" of congressional intent. Indeed, the rule was applied by the court in *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177 (9th Cir. 1998), *cert. denied*, 525 U.S. 1105 (1999), and Petitioners have not suggested that the Court of Appeals

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[3] *Baldwin* concerned a 1935 challenge to a state milk-pricing statute under the Commerce Clause, without reference to any congressional expression on the matter. In the instant case, Congress has expressed itself, and the question is one of discerning Congress' intent – a question not presented to the Court in *Baldwin*.

misunderstood the rule in that case, at least insofar as the court there construed Section 144 to exempt California's milk-composition standards from preemption under the Commerce Clause. There is, therefore, no dispute that, by Section 144, Congress made a "clear statement" of intent to exempt *some* aspect of California's regulation of milk production. The only dispute is over the intended *scope* of that exemption.

Indeed, Petitioners are themselves inconsistent in describing what they believe to be the "clear statement" rule, demanding in one instance a "clear and unambiguous expression of legislative intent," Ponderosa Pet., p. 15, but then acknowledging that a "clear statement" may have to be discerned from the context of the language, "if not expressly contained in the statutory text." *Id.* at 16; *see also,* Hillside Pet., p. 24 ("Proper statutory construction . . . requires courts to look at the section in full context.")

In point of fact, Petitioners' complaint is not the absence of a clear statement of congressional intent to exempt California's milk laws from preemption under the Commerce Clause. It cannot reasonably be disputed that there is quite a "clear statement" of congressional intent to exempt *some* aspect of California's milk laws. 7 U.S.C. § 7254. Petitioners' complaint is that the Court of Appeals engaged in statutory construction to determine that the *scope* of that congressional intent encompasses California's pricing and pooling laws,[4] and Petitioners disagree

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[4] In point of fact, the specific question presented by Petitioners in No. 01-1018 is even less deserving of this Court's

with the court's analytical methodology. But that is not a sufficient basis for certiorari. S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . misapplication of a properly stated rule of law.")

In any event, the Court of Appeals had it right when it determined that Section 144 exempted the subject pooling plan amendments. Each of the challenged provisions is interrelated to California's fluid milk standards. The California Legislature has declared that the pooling plan is "enacted in the exercise of the police powers of this state for the purpose of protecting the health and welfare of the people of this state." Cal. Food & Agric. Code § 62704, Resp. App. The Legislature also declared the vital importance of these provisions to milk content:

> It is hereby declared that fluid milk and fluid cream are necessary articles of food for human consumption; *that the production and maintenance of an adequate supply of healthful milk of proper chemical and physical content,* free from contamination, is vital to public health and welfare, and that the production, transportation, processing, storage, distribution and sale of fluid milk and fluid cream in the State of California is an industry, in whole and in part, affecting public health and welfare . . . .

Cal. Food & Agric. Code § 62701. The Court of Appeals properly concluded that the Amended Pooling Plan works as a means of "effecting" California's fluid milk standards.

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attention, concerning as it does the weight to be given proffered indicia of legislative intent.

C. In This Complicated And Highly Regulated Area of Milk Production, Petitioners Have a More Appropriate Forum in Congress And The Secretary of Food and Agriculture For Seeking Clarification of Any Asserted Misunderstanding of Congressional Intent

Petitioners themselves acknowledge that Title 1, Subtitle D, Chapter 1 of the 1996 Farm Bill, 7 U.S.C. §§ 7251-7259, Pet. App. A62, is a "complex and complicated interplay of federal taxpayer support, federal order reform, California Fluid Milk Standards and California make allowance issues." Hillside Pet., p. 12. "Taken together the California and federal system interact to create both regulated milk prices and a minimum price safety." *Id.* The amendments to California's pooling and pricing system have been in place since 1997. Petitioners have pointed to no adverse national or widespread impact, though they allege this to be the case in conclusory terms. *See* Argument at p. 11, *supra.* In an area of asserted economic delicacy, *see* Ponderosa Pet., p. 7 ("Even a relatively small increase or decrease in national milk production will produce a significant change of commodity prices and, therefore, farm milk prices"), where Congress has unmistakably given California great latitude in at least some areas of milk-production regulation, Congress is better suited to sort out the competing interests. *Cf., Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980) ("considerations in cases involving state proprietary action often will be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis. . . . [A]s a rule, the adjustment of

interests in this context is a task better suited for Congress than this Court.")

D. At Best, Only The Kuipers May Have Standing to Press a Claim Under The Privileges And Immunities Clause, And There Is No Evidence That They Have Sustained Any Burden as a Result of Their Arizona Residency; Furthermore, The Petition on Its Face Demonstrates The Insufficiency of This Claim

Petitioners in No. 01-950 do not present a question concerning the Privileges and Immunities Clause. Only Petitioners in No. 01-1018 seek consideration of such a question. *See* Ponderosa Pet., p. i, ¶2. Of those petitioners, however, it would appear that most have no standing to press the claim. Petitioner Ponderosa Dairy is an operating unit of Rockview Dairies, which is owned by a California corporation. Ponderosa Pet., p. 3. As corporate subsidiaries, neither Ponderosa nor Rockview Dairies has standing to assert a claim under the Privileges and Immunities Clause. *Western and Southern Life Ins. Co.*, 451 U.S. 648, 656 (1981). Indeed, the claims of all corporate dairies were dismissed by the Court of Appeals on this very ground, Pet. App. A13-A14, and none of the petitioners has sought review by this Court of that basis for dismissal. Accordingly, neither Ponderosa Dairy nor Rockview Dairies has standing to petition on the privileges-and-immunities question presented in No. 01-1018.

Petitioner Pahrump Dairy, also a petitioner in No. 01-1018, is a Nevada dairy operated by a California partnership. Ponderosa Pet., p. 3. Even assuming that partnerships have standing to assert claims under the

Privilege and Immunities Clause, *but see, Paul v. Virginia*, 75 U.S. (8 Wall) 168, 177 (1869) ("The term citizens [as used in Article IV Privileges and Immunities Clause] applies only to natural persons . . . not to artificial persons created by the legislature"); *W.C.M. Window Co., Inc. v. Bernardi*, 730 F2.d 486, 492-493 (7th Cir. 1984) (unincorporated association not a citizen for purposes of Privileges and Immunities Clause), a *California* partnership obviously has no standing to claim a deprivation of rights under the Privileges and Immunities Clause by the very State of its residence. *See Slaughter-House Cases*, 83 U.S. 36, 77 (1872) (Privileges and Immunities Clause provides "no security for the citizen of the State in which [rights] were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens.")

This leaves, then, only Petitioners Darrel and Diane Kuiper, natural persons doing business as D. Kuiper Dairy in Arizona, as the sole petitioners capable of asserting a claim under the Privileges and Immunities Clause. Ponderosa Pet., p. 3. These petitioners, too, declined to amend their complaint so as to present evidence in support of their allegation of discrimination, so there is no record evidence upon which to evaluate the validity of their claim.[5] Moreover, these petitioners cannot rest on generalized allegations of discrimination in the complaint below. *See* Pet. App. A10-A12. Those disabilities were

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[5] Indeed, although the Petition in this Court asserts that the Kuipers reside in Arizona, Ponderosa Pet., p. 3, that fact is not alleged in the complaint below.

alleged to be suffered as well by Ponderosa Dairy, Rockview Dairies, and Pahrump Dairy – Nevada dairy operations that are owned by a *California* corporation and partnership. From the face of the complaint, then, these disabilities cannot be said to depend on the residency or citizenship of the owner of a dairy.

Petitioners cite no authority for the proposition that a violation of the Privileges and Immunities Clause can be based on other than residency. Residency preferences were at issue in each of the cases cited by the Ponderosa petitioners, *Chalker v. Birmingham & N.R. Co.*, 249 U.S. 522 (1919); *Tolchin v. Supreme Court of New Jersey*, 111 F.3d 1099 (3d Cir. 1977). In *Chalker*, the Court overturned a Tennessee statute requiring out-of-state construction companies to maintain an office in Tennessee, or pay a higher tax for the privilege of doing business there. In *Tolchin*, the Court of Appeals upheld New Jersey's express requirement that to practice law in that State, an attorney must maintain "a bona fide office for the practice of law in this State regardless of where the attorney is domiciled." 111 F.3d at 1113.

If there are other disabilities that are *uniquely* suffered by non-California owners of out-of-state dairies as a result of the 1997 price pooling system, these can be alleged and tried in other proceedings.[6]

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[6] Indeed, Petitioners nowhere suggest that non-California owners of dairies within California are treated any differently than are California owners of California dairies.

CONCLUSION

For the foregoing reasons, Respondents urge the Court to deny the petitions for certiorari.

Dated: March 5, 2002

Respectfully submitted,

BILL LOCKYER
Attorney General of the
State of California
MANUEL M. MEDEIROS
State Solicitor General
RICHARD M. FRANK
Chief Assistant Attorney General
BRUCE REEVES (*Counsel of Record*)
Deputy Attorney General

ANDREA HACKETT HENNINGSEN
STEEFEL, LEVITT & WEISS

Counsel for Respondents
William J. Lyons, Jr., Secretary, Department of Food & Agriculture, State of California; Robert Tad Bell, Undersecretary, Department of Food & Agriculture, State of California

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Excerpts of California Food and Agricultural Code (2001)

§ 61801 Public interest; police powers

The production of market milk is hereby declared to be a business affected with a public interest. The provisions of this chapter are enacted in the exercise of the police powers of this state for the purpose of protecting the health and welfare of the people of this state.

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§ 61802 Legislative statement of fact and policies

The Legislature hereby declares all of the following:

(a) Market milk is a necessary article of food for human consumption.

(b) The production and maintenance of an adequate supply of healthful market milk of proper chemical and physical content, free from contamination, is vital to the public health and welfare, and the production, transportation, processing, and storage of market milk in this state is an industry affecting the public health.

(c) Because of the perishable quality of milk, the nature of milk production, the varying seasonal production and demand factors, and other economic factors affecting the milk industry, the potential exists for economic disruption, in the absence of regulation, in the production, marketing, and sale of market milk which may constitute a menace to the health and welfare of the inhabitants of this state and may tend to undermine sanitary regulations and standards of content and purity, however effectually the sanitary regulations may be enforced.

(d) Health regulations alone are insufficient to prevent economic disturbances in the production of milk which may disrupt the future supply of market milk and to safeguard the consuming public from future inadequacy of a supply of this necessary commodity.

(e) It is the policy of this state to promote, foster, and encourage the intelligent production and orderly marketing of commodities necessary to its citizens, including market milk, and to eliminate economic waste, destructive trade practices, and improper accounting for market milk purchased from producers.

(f) It is recognized by the Legislature that the economic factors concerning the production, marketing, and sale of market milk in California may be affected by the national market for milk for manufacturing purposes.

(g) It is recognized by the Legislature that in recent years the supply of manufacturing milk in California, as defined in Section 32509, has consistently declined and continues to decline, and that market milk has virtually supplanted manufacturing milk for manufacturing purposes in this state, and that it is therefore necessary to conform the pricing standards governing minimum producer prices for market milk established under this chapter to current economic conditions.

(h) It is recognized by the Legislature that the levels of retail prices of milk and milk products paid by consumers are affected by a large number of economic and other factors apart from minimum producer prices for market milk established under this chapter, many of which factors are not within the power of the director to regulate or control, particularly since the Legislature

repealed provisions concerning establishment of minimum wholesale and retail prices. It is further recognized by the Legislature that, in order to accomplish the purposes of this chapter and to promote the public health and welfare, it is essential to establish minimum producer prices at fair and reasonable levels so as to generate reasonable producer incomes that will promote the intelligent and orderly marketing of market milk in the various classes, and that minimum producer prices established under this chapter should not be unreasonably depressed because other factors have affected the levels of retail prices paid by consumers.

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§ 62700 Business affected with public interest; Exercise of police powers

The production and distribution of fluid milk and fluid cream is hereby declared to be a business affected with a public interest. The provisions of this chapter are enacted in the exercise of the police powers of this state for the purpose of protecting the health and welfare of the people of this state.

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§ 62701 Declaration of policy; Marketing and consumption of milk and cream

It is hereby declared that fluid milk and fluid cream are necessary articles of food for human consumption; that the production and maintenance of an adequate supply of healthful milk of proper chemical and physical content, free from contamination, is vital to public health

and welfare, and that the production, transportation, processing, storage, distribution and sale of fluid milk and fluid cream in the State of California is an industry, in whole and in part, affecting public health and welfare; that unfair, unjust, destructive and demoralizing trade practices have appeared within this industry and these practices constitute a menace to the health and welfare of the inhabitants of this state by threatening the stability of this industry and by thereby endangering the assurance to the people of the State of California of the maintenance of an adequate supply of this necessary commodity; that it is a policy of this state to promote, foster and encourage the intelligent production and orderly marketing of commodities necessary to its citizens, including fluid milk and fluid cream, and to eliminate speculation, waste, improper marketing, unfair and destructive trade practices, and improper accounting for milk purchased from producers.

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§ 62702 Declaration of purposes

It is recognized by the Legislature that currently the powers conferred upon the director by Chapter 2 (commencing with Section 61801) are inadequate to enable the dairy industry to develop and maintain satisfactory marketing conditions and bring about and maintain a reasonable amount of stability and prosperity in the production of fluid milk and fluid cream; and that to accomplish these purposes, and particularly to insure to consumers within California an adequate and continuous supply of pure, fresh, and wholesome milk at fair and reasonable

prices, including a reasonable estimate of the additional supply which is needed to provide for normal fluctuations in production and in consumer demand for those products, those powers must be supplemented by the powers conferred in this chapter upon the director to equalize gradually the distribution of class 1 usage among the producers of this state.

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§ 62703 Establishment of production base and pool quota; Use of pooling plan formulated by director

In effectuating the purposes of this chapter, a production base and a pool quota shall be established for each producer pursuant to Section 62707. The establishing of these bases and their functions shall be as provided in the pooling plan formulated by the director pursuant to the provisions of this chapter.

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§ 62704 Development of pooling plan

The director is authorized to develop a proposed pooling plan and to designate the proposed areas in which the plan will be made effective. He shall appoint fluid milk producers, and representatives of producers, to be the members and alternate members of a formulation committee, reasonably representative of all producers and areas to be included in the proposed pooling plan, which committee shall advise and assist the director in

the establishment of the proposed pooling plan area and in the formulation of the proposed pooling plan. The pooling plan shall include all areas covered by stabilization and marketing plans under Chapter 2 (commencing with Section 61801), except any relatively isolated region of the state may be excluded therefrom, if the director, after a public hearing, finds that the inclusion of the region is not practical or in conformity with the purposes of the pooling plan, or if he finds that the producers in the relatively isolated region do not desire to be a part of either their own or one of the pools.

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§ 62711 Amount payable for fluid milk production

(a) Except as provided in subdivision (h) of Section 62707, each producer shall be paid the highest usage for that amount of his or her fluid milk production that is equal to his or her pool quota and shall be paid the next highest usage for the difference between his or her pool quota and his or her production base under the production pool designated pursuant to this chapter and the lowest usage for all milk produced in excess of his or her production base under the overproduction pool designated pursuant to this chapter.

(b) In calculating the pool value, the volume of milk that has been classified as restricted use market milk shall be credited to the handler at the class 4a or class 4b price, whichever is lower.

Excerpts of Pooling Plan for Market Milk, as amended effective July 1, 1997 California Department of Food and Agriculture

Article 9. Computation of Handler Obligation and Quota, Base, and Overbase Pool Prices

Section 900. The gross pool obligation of each handler for each of the plants or for a cooperative association acting as a handler under Paragraph 105(c) shall be computed as follows:

(a) Multiply the quantities for each class as determined under Sections 801, 802 and 803 for each plant by the appropriate price announced for such class by the secretary, f.o.b. such handler's plant or the pool or nonpool plant to which diverted;

(b) Multiply the quantities for each class as determined under Sections 801, 802 and 803 for each cooperative association acting as a handler under Paragraph 105(c) by the appropriate price announced for such class by the secretary, f.o.b. the pool or nonpool plant where the milk was first received from producers;

* * *

Supreme Court, U.S.
FILED
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No. 01-1018

IN THE

Supreme Court of the United States

PONDEROSA DAIRY, *et al.*
Petitioners,

v.

WILLIAM J. LYONS, JR., Secretary,
California Department of Food & Agriculture, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JOHN H. VETNE
15 Powow St.
Amesbury, Ma. 01913
(978) 388-2480

RICHARD HESSE *
2 White Street
Concord, NH 03301
(603) 228-1541

* Counsel of Record

March 20, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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LIST OF PARTIES

The Petitioners are Ponderosa Dairy, Parhump Dairy, Rockview Dairies, Inc., Darrel and Diane Kuiper, d/b/a D.Kuiper Dairy. The Respondents are William J. Lyons, Jr., Secretary of the California Department of Food & Agriculture, and Robert Tad Bell, Undersecretary of the California Department of Food & Agriculture (hereinafter "CDFA").

CORPORATE DISCLOSURE STATEMENT

None of the corporate Petitioners have issued stock or securities that are publicly traded, and none of the petitioners have a corporate parent, subsidiary or affiliate that has issued publicly traded stock or securities.

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CDFA, "California Dairy Review" (Vol. 5, Issue 9, Sept.2001) (http://www.cdfa.ca.gov/dairy/pubs/DairyRvw/index.html) 4

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Edward V. Jesse, "Section 102: The California Make Allowance Issue" (Marketing & Policy Briefing Papers, University of Wisc. Madison, No. 46, Apr. 1994) (http://aae.wisc.edu/www/pub/mpbpapers/mpb46.pdf) 4

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

The lead argument of the Respondent California Department of Food and Agriculture ("CDFA") for avoiding certiorari review is a disclaimer of national impact on the dairy industry, and on USDA's Federal Milk Order Program, if the 9th Circuit's holding—that Congress granted California "sweeping" authority to protect its milk market from competition without any Commerce Clause limit—is allowed to stand. Respondent's Brief at 1, 11-12. CDFA's argument asks this court to suspend belief in elementary law of supply and demand, to disregard judicial experience in inter-regional dairy disputes, and to avoid reliance on prior acknowledgments of both USDA and CDFA of the impact of California on the national dairy industry and federal dairy

programs. On the merits, CDFA's claim that the lower court faithfully applied the "clear statement" rule is disproved by this Court's recent decision in *Raygor v. Regents of the University of Minnesota*, 534 U. S. ____, 122 S.Ct. 999 (2002)

ARGUMENT

I. THIS COURT'S EXPERIENCE, AND UNQUALIFIED DECLARATIONS OF USDA AND OF CALIFORNIA'S CDFA, CONFIRM THE NATIONAL SIGNIFICANCE OF THIS CASE.

This Court's experience with the national impact of protectionism in the dairy industry includes not only a "surprisingly large number of . . . Commerce Clause cases," *West Lynn Creamery v. Healy*, 512 U.S. 186, fn. 22 (1994), but also application of Congress' express prohibition, since 1935, against the use of regulatory trade barriers by the U.S. Secretary of Agriculture. *Lehigh Valley Cooperative v. United States*, 370 U.S. 76, 84-97 (1962) (concluding, on invalidating a pool obligation and credit scheme similar to the contested CDFA rule, that 7 U.S.C. § 608c(5)(G) "was compendiously intended to prevent the Secretary from setting up, under the guise of price-fixing regulation, any kind of economic trade barriers, whether relating to milk or its products."). The milk market in the United States has become more national and regionally interdependent since these decisions.

Just over two years ago, the U.S. Department of Agriculture completed comprehensive reform of the Federal Milk Order Program. In that process, USDA relied on a national model of milk and dairy product supply and demand—the Cornell University U.S. Dairy Sector Simulator—to guide the structure of reformed federal milk regulations. 64 Fed. Reg. 16025, 16037-38 (Apr. 2, 1999). Noting the desirability of minimum federal prices to reflect "the national supply and

demand for manufacturing milk," USDA expressly acknowledged the effect of California milk pricing on its federal reform deliberation process.

> Comparisons to the California prices are included because many commenters expressed the view that the proposed rule resulted in prices that put plants regulated by Federal orders at a competitive disadvantage to California plants and that alignment with California pricing was essential. Most commenters did not express the view that Federal order prices should equal California prices, but that Federal order prices should be in alignment, *i.e.* "reasonably close". [*Id.* at 16100-16101].

The California Department of Food and Agriculture has likewise admitted the national impact of its dairy pricing programs. In a recent rulemaking decision, CDFA stated:

> California's increasing rate of milk production and the increasing number of cows both strongly suggest that there are ample economic incentives to produce more milk. Since Class 4a and 4b [milk for butter, powder and cheese] prices are among the lowest in the nation . . . it is reasonable to conclude that the current Class 1 prices levels provide some of existing incentives to produce more milk. *As California's share of the national supply grows ever larger, its increasing rate of annual production increase can dramatically affect the delicate balance between the national milk supply and commercial demand.*[1]

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[1] California Department of Food and Agriculture, "Statement of Determination and Order of the Secretary of Food and Agriculture regarding proposed amendments to the Stabilization and Marketing Plans for Market Milk for the Northern and Southern California Marketing Areas Based Upon a Public Hearing Held on September 21, 1999" (Oct. 21, 1999) at 46 (reproduced in more complete part in the Reply Brief, Appendix 21a-13a, of Hillside Dairy, No. 01-950). This excerpt illustrates a criticism by Eastern dairy analysts that California's relatively high prices for Class 1 milk are used to cross-subsidize relatively low

II. THIS COURT'S RECENT OPINION IN *RAYGOR v. REGENTS OF THE UNIVERSITY OF MINNESOTA* UNDERSCORES THE ERROR IN THE LOWER COURT'S ARTICULATION AND APPLICATION OF THE "CLEAR STATEMENT" RULE.

On the merits of whether or not the lower court faithfully followed the "clear statement" rule of statutory construction, applicable whenever Congress intends to alter the usual constitutional balance between the States and the Federal Government, Respondent argues: "Congress made a 'clear statement' of intent to exempt *some* aspect of California's regulation of milk production. The only dispute is over the intended scope of the exemption." Respondent's Brief at 14. Respondent then proceeds to assert that the lower court correctly concluded that Congress implicitly intended to include California's milk pricing and pooling laws because these are deemed by California to work "as a means of 'effecting' California's fluid milk standards." *Id.* at 15.

Initially, this argument incorrectly implies that the contested pooling provisions were adopted by CDFA with

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prices for Class 4 milk. *See* Robert Cropp, Cornell Program on Dairy Markets and Policy "MILK PRICING AND POOLING IN CALIFORNIA" (Cornell University, March 1996) (http://www.cpdmp.cornell.edu/), and Edward V. Jesse, "Section 102: The California Make Allowance Issue" (Marketing & Policy Briefing Papers, University of Wisc. Madison, No. 46, Apr. 1994) (http://aae.wisc.edu/www/pub/mpbpapers/mpb46.pdf). Although Respondent's brief (at 11) professes inconsistency in arguments that commodity prices in a protected market can be both higher and lower than would exist in a freely competitive marketplace, CDFA has elsewhere simply acknowledged that: "All classified pricing systems, including those used in federal orders and in California, have been criticized for using high fluid milk prices to subsidize manufacturing milk prices." CDFA, "California Dairy Review" (Vol. 5, Issue 9, Sept. 2001) at 4 (http://www.cdfa.ca.gov/dairy/pubs/DairyRvw/index.html).

some explanation or justification that they would help effect California's milk standards. There was no such rationale in the state agency's decision. It also incorrectly implies that the lower court's opinion was limited to pricing or pooling rules adopted for the purpose of promoting packaged fluid milk standards compliance. It was not. Nor does CDFA, in any event, cite to any authority that would permit a state by rulemaking ritual to fix the scope of its own Commerce Clause exemption.

The lower court's error in reading the "clear statement" rule to encompass implied inclusion of milk pooling rules, to which no hint was made in Section 144 of the Farm Bill, is reinforced by this Court's decision last month in *Raygor v. Regents of the University of Minnesota*, 534 U. S. ___, 122 S.Ct. 999 (2002). In an 11th Amendment context, *Raygor* clarified that the "clear statement" rule requires courts to examine acts of Congress "for a clear statement of what the rule includes, not a clear statement of what it excludes." Section 144 of the 1996 Farm Bill expressly includes only California laws "to establish or continue to effect" packaged milk composition and labeling requirements (Respondent's Brief at 2). The lower court misapplied this Court's "clear statement" rule in expanding Section 144 to other regulations.

CONCLUSION

The Petition for Writ of Certiorari should be granted. Alternatively, the Petition should be granted, the decision of the court of appeals vacated pursuant to Supreme Court Rule 16.1, and the case remanded for further consideration in the light of *Raygor v. Regents of the University of Minnesota*, 534 U. S. ___, 122 S.Ct. 999 (2002).

Respectfully submitted,

JOHN H. VETNE
15 Powow St.
Amesbury, Ma. 01913
(978) 388-2480

RICHARD HESSE *
2 White Street
Concord, NH 03301
(603) 228-1541

* Counsel of Record

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Nos. 01-950 and 01-1018

In the Supreme Court of the United States

HILLSIDE DAIRY INC., A&A DAIRY, L&S DAIRY, AND MILKY WAY FARMS, PETITIONERS

v.

WILLIAM J. LYONS, JR., SECRETARY, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, ET AL.

PONDEROSA DAIRY, ET AL., PETITIONERS

v.

WILLIAM J. LYONS, JR., SECRETARY, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

BARBARA MCDOWELL
Assistant to the Solicitor General

MARK B. STERN
ARA B. GERSHENGORN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 7 U.S.C. 7254 exempts California's milk pricing and pooling regulations from scrutiny under the Commerce Clause.

2. Whether California's milk pricing and pooling regulations violate the Privileges and Immunities Clause.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order of April 15, 2002, inviting the Solicitor General to express the views of the United States.

STATEMENT

The principal question in this case is whether 7 U.S.C. 7254, which saves from preemption certain California laws regarding the composition and labeling of "fluid" (*i.e.*, processed) milk, exempts the State's entire program regulating the market in "raw" (*i.e.*, unprocessed) milk from Commerce Clause scrutiny. As explained below, the United States has concluded that, although the court of appeals erred in

holding that Section 7254 furnishes such an exemption, its holding does not warrant review at this time.

1. The question of the proper interpretation of Section 7254 in this case arises against the backdrop of the complex regulatory regime governing regional markets in raw milk. In the 1930s, Congress enacted a series of statutes, including the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. 601 *et seq.*, to regulate the marketing of milk and other dairy products. The need to regulate milk marketing derives from two distinct phenomena: (1) a pricing structure that permits different returns for raw milk of the same quality depending upon its end use (*e.g.*, as fluid milk, as powdered milk, or as an ingredient in products such as butter and cheese), and (2) a cyclical production process with fairly stable demand, which requires farmers to maintain sufficiently large herds to meet the demand for fluid milk even in periods of lean production. *Zuber* v. *Allen*, 396 U.S. 168, 172-173 (1969). Those two features led to "utter chaos" when the market was unregulated. *Id.* at 174. In an effort to "restore order to the market and boost the purchasing power of farmers," *ibid.*, Congress enacted the Agricultural Adjustment Act, ch. 25, 48 Stat. 31, which later formed the basis for the AMAA.

The AMAA authorizes the Secretary of Agriculture to "establish and maintain such orderly marketing conditions * * * as will establish, as the price to farmers, parity prices." 7 U.S.C. 602(1). It accordingly empowers the Secretary to issue "marketing orders" that regulate minimum prices that dairy farmers may receive in a defined geographic area. The orders classify milk according to its end use, establish a minimum price for each class of milk, and require regulated distributors to account to a regional pool for each class of milk that they purchase. The regional pools assure dairy farmers a uniform "blend price" for each unit of milk sold, based on a weighted average value of all milk sold

within the marketing area. See *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 189 n.1 (1994); *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 342-343 (1984).

2. Not every geographic area in the United States is covered by a federal marketing order. See 7 C.F.R. Pts. 1000-1199; *Block*, 467 U.S. at 342. The California dairy industry has never participated in such an order. Instead, the State has adopted its own regulatory program to stabilize the market for raw milk. California dairy farmers are guaranteed a uniform minimum return for their raw milk, regardless of the end use to which the raw milk is to be put by a processor (handler). At the same time, California handlers are required to make different total outlays for raw milk depending on its end use, which reflects the higher value of raw milk used to produce fluid milk over raw milk used to produce other products. A pooling mechanism among handlers reconciles the varying amounts that handlers pay for raw milk with the uniform amounts that California dairy farmers receive for raw milk.

a. To accomplish those regulatory goals, California assigns raw milk to one of five classes depending on its end use. Cal. Food & Agric. Code §§ 61932-61935 (West 2001). Class 1, which consists of raw milk used to produce fluid milk products, typically demands the highest price. Other classes, such as raw milk used to produce butter (Class 4a) and cheese (Class 4b), typically demand lower prices. The California Department of Food and Agriculture (CDFA) establishes a minimum price for each component of raw milk (butterfat, solids-not-fat, and fluid carrier) depending on the class of product into which the raw milk is to be manufactured. A handler that purchases raw milk from a California dairy farmer for processing into fluid milk is obligated to pay the Class 1 price, while a handler that purchases raw milk from a California dairy farmer for processing into cheese is obligated to pay the Class 4b price.

The price that a handler pays for raw milk—which, as explained above, is based on its end use—does not equal the price that a dairy farmer receives for raw milk. All California dairy farmers are guaranteed a uniform minimum price for their raw milk regardless of the how the milk is used by the handler that buys it. Otherwise, dairy farmers would have an incentive to compete to sell their raw milk to handlers that produce fluid milk, because those handlers would pay more for raw milk than would handlers that produce other dairy products. Such competition was thought to result in the inefficient movement of milk around the State. See 01-950 Pet. App. A3, A14 n.3 (Pet. App.).

The uniform minimum price guaranteed to California dairy farmers is a blend price, which CDFA computes based on a weighted average of all raw milk purchases in the State. It thus falls somewhere between the Class 1 price and the Class 4b price. See Pet. App. A3. In fact, CDFA computes two such blend prices—the "quota" price and the "overbase" price. See Milk Pooling Branch, CDFA, *Pooling Plan for Market Milk As Amended* §§ 902-904 (Sept. 1, 2001) <http://www.cdfa.ca.gov> *(Pooling Plan)*. The quota price, which is the higher of the two, is paid for an amount of production that was originally determined for California dairy farmers based on their respective shares of the fluid milk market in the 1960s and that has been subject to certain adjustments in subsequent years. See Cal. Food & Agric. Code § 62707 (West 2001). The "overbase" price is paid for a California dairy farmer's milk in excess of any quota.[1]

The pooling mechanism among handlers, which results in a transfer of funds from handlers of raw milk for higher-priced

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[1] California dairy farmers may buy and sell quota. See Pet. App. A4. Out-of-state dairy farmers are not permitted to own quota, because quota is available only to a "[p]roducer," which is defined as "any person that produces market milk in the State of California from five or more cows." *Pooling Plan* § 104 (Pet. App. A79).

uses (*e.g.*, fluid milk) to handlers of raw milk for lower-priced uses (*e.g.*, butter and cheese), reconciles the uniform price received by California dairy farmers with the different prices paid by handlers depending upon the uses that they make of raw milk. In order to determine each handler's obligation to the pool, CDFA calculates an "in-plant blend price" for each handler, which is based on the particular use or uses that the handler makes of the raw milk that it purchases. See *Pooling Plan* Art. 9 (The "in-plant" blend price must be distinguished from the "quota" and "overbase" blend prices, which are uniform prices paid to California dairy farmers and are based on usage of raw milk by *all* handlers, rather than by a single handler.). The handler's in-plant blend price is then multiplied by the total amount of raw milk that the handler has purchased to determine the handler's "gross pool obligation." The handler must account to the pool based on that amount, subject to certain adjustments. If the total amount of a handler's payments to dairy farmers is less than its pool obligation (as is typically the case for handlers that primarily produce Class 1 fluid milk, because their in-plant blend price exceeds the "quota" and "overbase" prices guaranteed to dairy farmers), the handler pays the difference into the pool. *Id.* § 1003. If the total amount of a handler's payments to dairy farmers exceeds its pool obligation (as is typically the case for handlers that primarily produce butter or cheese, because their in-plant blend price is lower than the "quota" and "overbase" prices), the handler draws on the pool to recover the difference. *Id.* § 1004; see Pet. App. A3-A5.

b. Before the 1997 amendments to the California plan, if a handler bought milk from an out-of-state dairy farmer, the handler received a credit against its pool obligation based on its in-plant blend price. Pet. App. A17. As a consequence, although a handler that principally produced fluid milk had to pay money into the pool for its raw milk purchases from

California dairy farmers, it did not have to pay money into the pool for its purchases from out-of-state farmers.

In 1997, the plan was amended so that the credit that a handler receives for out-of-state milk purchases is equal to the lower of the handler's in-plant blend price or the quota price. See *Pooling Plan* § 900(d); Pet. App. A4-A5. For a handler that principally produces fluid milk, the quota price is lower than its in-plant blend price. As a result, a handler that purchases raw milk from out-of-state dairy farmers to be processed into fluid milk typically must contribute some additional amount to the pool for those purchases. The 1997 amendment thus reduced an incentive that previously existed for handlers that produce fluid milk to purchase raw milk from dairy farmers outside California. At the same time, however, out-of-state dairy farmers, unlike California dairy farmers, are not guaranteed any minimum price for their raw milk (much less the quota price).

c. California also sets composition standards for fluid milk sold in the State. Those standards, which exceed the standards set by the federal Food and Drug Administration, establish minimum levels of solids-not-fat and butterfat. See Cal. Food & Agric. Code § 35784 (West. 2001). California handlers standardize their fluid milk by adding a fortifying agent, and they are provided with a fortification allowance that reduces the cost of doing so. *Pooling Plan* § 803(k). Out-of-state handlers are not eligible to receive that fortification allowance. See Pet. App. A25-A26.

3. In the Federal Agriculture Improvement and Reform Act of 1996 (FAIR Act), Pub. L. No. 104-127, 110 Stat. 888, Congress required the consolidation and reformation of federal milk marketing orders. See 7 U.S.C. 7253. Congress authorized the Secretary of Agriculture, "[u]pon the petition and approval of California dairy producers," to "designate the State of California as a separate Federal milk marketing order." 7 U.S.C. 7253(a)(2).

In addition, Congress included in the FAIR Act the provision at issue in this case, 7 U.S.C. 7254, which states:

> Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding—
>
> (1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or
>
> (2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

4. In consolidated actions, petitioners, who operate dairy farms in Nevada and Arizona, challenged the constitutionality of the 1997 amendments to the California pooling plan. They contended that the pooling plan discriminates against out-of-state dairy farmers in violation of the Commerce Clause and the Privileges and Immunities Clause.

a. The district court rejected those claims. Pet. App. A13, A16-A22. The court granted summary judgment for the State respondents on the Commerce Clause claim. The court relied on *Shamrock Farms Co.* v. *Veneman*, 146 F.3d 1177 (9th Cir. 1998), cert. denied, 525 U.S. 1105 (1999), which the court understood as holding that 7 U.S.C. 7254 "immunized California's milk pricing and pooling laws from Commerce Clause challenge." Pet. App. A19. The court dismissed petitioners' claim under the Privileges and Immunities Clause on the ground that the pooling plan does not discriminate based on out-of-state residency or citizenship. *Id.* at A13.

b. The United States Court of Appeals for the Ninth Circuit affirmed. Pet. App. A1-A15.

The court of appeals, like the district court, held that *Shamrock* controlled the Commerce Clause claim. Although *Shamrock* had addressed California's fortification require-

ment for fluid milk and its fortification allowance for in-state handlers, not its pricing and pooling requirements for raw milk, the court held that "*Shamrock* broadly refers to the pricing and pooling laws and finds them to be closely related to California's composition requirements and protected from Commerce Clause challenges." Pet. App. A7-A8. The court further held that the legislative history of 7 U.S.C. 7254 "demonstrate[s] that California's pricing and pooling laws were considered to be an important element of California's milk regulatory scheme and necessary to maintain the 'standards of content and purity' for milk." Pet. App. A8 (quoting *Shamrock*, 146 F.3d at 1182). The court thus concluded that California's raw milk and fluid milk regulations are "closely related" and that it "follows that the 1997 amendments which directly affect raw milk, indirectly affect fluid milk." *Id.* at A10.

The court of appeals also affirmed the district court's dismissal of petitioners' claim under the Privileges and Immunities Clause. The court noted that the corporate petitioners could not state such a claim, because that Clause does not protect corporations. Pet. App. A13. The court held that the individual petitioners' claim failed because "the classifications the pooling plan amendments create are based on the location where milk is produced," not on "any individual's residency or citizenship." *Id.* at A14.

DISCUSSION

The court of appeals held that 7 U.S.C. 7254 exempts all of California's milk pricing and pooling regulations from the limitations imposed by the Commerce Clause. That conclusion is incorrect. This Court has repeatedly instructed that such exemptions must be unmistakably clear. There is no indication at all in the text or legislative history of Section 7254 that Congress intended to immunize any of California's milk regulations from challenge under the Commerce Clause. Moreover, even if its reference to "any other pro-

vision of law" were understood to encompass the Commerce Clause, Section 7254 would provide an immunity only for the State's regulations governing the composition and labeling of fluid milk, not for its separate regulations governing the pricing and pooling of raw milk.

The court of appeals' interpretation of Section 7254, although erroneous, does not, on balance, require the Court's review at this time. The decision may be viewed as involving the misapplication of the well-established legal standard governing Commerce Clause exemptions to the particular statute claimed to create such an exemption in this case. This Court ordinarily does not grant certiorari to correct a mistaken application of settled law or an erroneous interpretation of a federal statute by a single court of appeals. Moreover, because Section 7254 applies only to California "law[s], regulation[s], or requirement[s]," no inter-circuit conflict with respect to its interpretation or application is likely to arise. Although petitioners predict that the court of appeals' decision will have a significant adverse impact on federal milk marketing programs and the dairy industry nationally, the United States Department of Agriculture has not detected any such impact to date.

The question presented by petitioners in No. 01-1018 under the Privileges and Immunities Clause also does not require the Court's review. The court of appeals' rejection of the Privileges and Immunities claim turns on its understanding of the unique provisions of state law at issue here.

I. THE COURT OF APPEALS' HOLDING THAT CONGRESS EXEMPTED CALIFORNIA'S MILK PRICING AND POOLING PLAN FROM THE COMMERCE CLAUSE, ALTHOUGH ERRONEOUS, DOES NOT WARRANT THIS COURT'S REVIEW

1. Although the Commerce Clause "limits the power of the States to erect barriers against interstate trade," "Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid." *Maine* v. *Taylor*, 477 U.S. 131, 137, 138 (1986). The Court has held, however, that Congress must make any Commerce Clause exemption "unmistakably clear," so as to assure that "all segments of the country are represented" in a decision to allow one State to affect persons or operations in other States. *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 91, 92 (1984); accord, *e.g.*, *Wyoming* v. *Oklahoma*, 502 U.S. 437, 458 (1992); *Taylor*, 477 U.S. at 139.

Section 7254 does not contain any indication at all, much less an "unmistakably clear" one, that Congress intended to immunize California's milk pricing and pooling laws from Commerce Clause scrutiny. The statutory text does not include any reference either to the Commerce Clause or to California's pricing and pooling laws for raw milk. Nor does the legislative history provide any indication that Congress intended Section 7254 to immunize those laws from scrutiny under the Commerce Clause.

First, Section 7254 states that "[n]othing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California" to enact or enforce certain of its own laws. The statutory text does not unambiguously indicate that Congress intended to exempt *any* of California's laws from the Commerce Clause. Section 7254 does not refer to the Commerce Clause specifically or to the Constitution more generally. Moreover, its directive that no provision of law

"shall be construed" in a particular manner is more naturally read as referring only to non-constitutional sources of law, because Congress is not ordinarily assumed to have intended to constrain the Judiciary's authority to construe the Constitution. Cf. *City of Boerne* v. *Flores*, 521 U.S. 507, 535-536 (1997). Nor is there any reason to suppose that Congress intended to authorize California, and only California, to erect barriers to interstate commerce that would otherwise be forbidden by the Commerce Clause. Section 7254 thus is best understood as protecting certain California laws against preemption only by "this Act" (*i.e.*, the FAIR Act) and any other provisions of federal statutory or regulatory law.

Second, Section 7254, even if understood to provide a Commerce Clause immunity for some state laws, does not reach the laws at issue here. Section 7254, by its terms, applies only to laws regarding "the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California" and "the labeling of such fluid milk products with regard to milk solids or solids not fat." 7 U.S.C. 7254(1) and (2). California's pricing and pooling laws do not regulate either fluid milk content or fluid milk labeling. They are thus outside the scope of whatever Commerce Clause exemption Section 7254 arguably provides.[2]

Congress's decision to confine Section 7254 to a subset of California's milk marketing laws appears to have been quite deliberate. Other provisions of the FAIR Act, of which Section 7254 was a part, demonstrate that, when Congress wanted to refer to California's milk pricing and pooling laws, Congress did so expressly. For example, in the immediately

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[2] As noted above (at 4), CDFA establishes minimum prices that handlers must pay for various components of raw milk—butterfat, solids-not-fat, and fluid carrier. Even if a regulation that provides for setting a price for the "milk solids" or "solids-not-fat" component of milk could be viewed as a regulation "regarding * * * the percentage of milk solids or solids not fat" in milk, Section 7254 refers to the percentage of those components in "fluid milk," not raw milk.

preceding section of the FAIR Act, Congress authorized the Secretary of Agriculture, "[u]pon the petition and approval of California dairy producers," to "designate the State of California as a separate Federal milk marketing order." 7 U.S.C. 7253(a)(2). Congress further provided that any such "order covering California shall have the right to reblend and distribute order receipts to recognize quota value," *ibid.*, thus referring specifically to the aspect of California's pricing and pooling laws that guarantees state dairy farmers with "quota" a higher blend price for their raw milk. Presumably, if Congress had wanted Section 7254 to encompass California's pricing and pooling laws, Congress would have referred to those laws with similar specificity.

The court of appeals acknowledged in its predecessor *Shamrock* case that Section 7254 "does not specifically refer to these [pricing and pooling] laws, as it does to the milk composition standards." 146 F.3d at 1182 (Pet. App. A34). In both this case and *Shamrock*, however, the court concluded that Section 7254 encompasses the pricing and pooling laws as well, reasoning that those laws and the composition and labeling laws are "interrelated and mutually interdependent." Pet. App. A7 (quoting *Shamrock*, 146 F.3d at 1182). The court was mistaken. Even if Congress's express exemption of one state law from the Commerce Clause were understood to extend to "interrelated and mutually interdependent" state laws, no such relationship exists between the composition and labeling laws expressly referred to in Section 7254 and the pricing and pooling laws at issue here.

The pricing and pooling laws are not part of the same regulatory program as the composition and labeling laws. The programs are authorized under different divisions of the California Food and Agriculture Code. Compare Cal. Food & Agric. Code § 35784 (West 2001) (composition standards), with *id.* §§ 62061 *et seq.* (minimum prices), and *id.* §§ 62700 *et seq.* (equalization pools). The programs were implemented

at different times. And they are administered by different components of the CDFA. See CDFA, *Welcome to California Dairy Programs* (visited Sept. 16, 2002) <http://www.cdfa.ca.gov/dairy> (noting that the milk composition laws are administered by the Milk and Dairy Foods Control Branch, while the milk pricing and pooling laws are administered by the Dairy Marketing Branch and the Milk Pooling Branch). It would be particularly unwarranted in such circumstances to construe Congress's express reference to California's composition and labeling laws for fluid milk as also encompassing California's pricing and pooling laws for raw milk.

Third, the context in which Section 7254 was enacted supports the conclusion that it was intended solely to protect California's fluid milk composition and labeling laws against preemption by federal statutes and regulations. In 1990, Congress enacted the Nutrition Labeling and Education Act of 1990 (NLEA), Pub. L. No. 101-533, 104 Stat. 2362, which prohibits States from setting standards of identity for a food that are different from the standards set by the FDA. See 21 U.S.C. 343-1(a). In response, out-of-state dairy farmers, who had previously complied with the California composition and labeling standards when marketing milk in the State, sought a judicial determination that the NLEA preempted the California standards. The State, in turn, petitioned the FDA for an exemption from the NLEA for its milk composition and labeling standards. See *Shamrock*, 146 F.3d at 1180 (Pet. App. A28).

At the congressional hearings on what was to become the FAIR Act, witnesses asked Congress specifically to exempt the California milk composition and labeling standards from preemption by the NLEA or other federal statutes. For example, Representative Thomas, the only Member of Congress to address the California milk regulations, urged that those standards be protected against preemption by "national nutritional labeling requirements." *Formulation of*

the 1995 Farm Bill (Dairy Title): Hearings Before the Subcomm. on Dairy, Livestock, and Poultry of the House Comm. on Agric., 104th Cong., 1st Sess. 435 (1995) (*House Hearings*). He did not urge that any of California's other milk regulations, including those involving the pricing and pooling of raw milk, be protected against federal statutory (or constitutional) challenge. Other witnesses similarly focused on the need to assure that California could continue to enforce its fluid milk composition standards.[3]

The Conference Report on the FAIR Act confirms that Section 7254 was directed only at the particular problem identified at the congressional hearings. See H.R. Conf. Rep. No. 494, 104th Cong., 2d Sess. 338 (1996). The Conference Report explains that Section 7254 "provides the State of California an exemption from the preemption provisions of any Federal law respecting standards of identity and labeling for fluid milk," so that California may "fully enforce and apply its fluid milk standards and their attendant labeling requirements to all fluid milk sold at retail or marketed in the State." *Id.* at 338-339.

The court of appeals, in adopting its more expansive interpretation of Section 7254, did not discuss the Conference Report, which is usually the most authoritative legislative history of an Act of Congress. The court nonetheless purported to find "ample support" in the legislative history —specifically, the testimony of two witnesses at the congressional hearings—for the proposition that "Congress intended that the milk pricing and pooling scheme be included in the exemption." *Shamrock*, 146 F.3d at 1182 (Pet. App. A34); accord Pet. App. A8. Ordinarily, the testimony of two witnesses, only one of whom is a Member of

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[3] See, *e.g.*, *House Hearings* 517-518 (prepared statement of A. J. Yates, Deputy Secretary, CDFA); *id.* at 547-548 (prepared statement of James E. Tillison, Alliance of Western Milk Producers); *id.* at 568 (prepared statement of Craig S. Alexander, Dairy Institute of California).

Congress, is an uncertain indication of what Congress as a whole intended. Here, moreover, the witnesses' testimony does not support the court's interpretation of Section 7254.

For example, Representative Thomas did not, as the court of appeals perceived, "explain[] that the success of California's milk standards is attributable to the state's pricing system." *Shamrock*, 146 F.3d at 1182 (Pet. App. A34). Instead, he stated that the success of the California dairy industry was attributable both to the State's "standards for fluid milk products which ensure a high quality product" and to the State's "pricing system for dairy products." *House Hearings* 435. He did not suggest that the composition regulations and the pricing regulations were dependent on each other for their effectiveness. Moreover, even if Representative Thomas had made the statement that the court attributed to him, the statement still would say nothing about any Commerce Clause exemption for the pricing and pooling laws.[4]

In sum, Section 7254 provides no indication that Congress intended to exempt California's pricing and pooling laws from the Commerce Clause, much less the "unmistakably clear" indication that this Court's decisions require. *South-Central Timber*, 467 U.S. at 91. The court of appeals erred in concluding otherwise.

2. The court of appeals' error with regard to the scope of Section 7254 cannot confidently be regarded as harmless. Although the United States does not take a position on the underlying constitutional question in this case, the California milk pricing and pooling laws, at a minimum, raise substan-

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[4] Similarly, Craig S. Alexander of the Dairy Institute of California discussed the State's milk composition regulations separately from other aspects of its milk marketing program. See *House Hearings* 480-482. He urged "[f]ederal legislation * * * to preserve California's standards" for the composition of fluid milk products, *id.* at 482, but did not urge legislation to protect the pricing and pooling laws against a federal constitutional challenge.

tial questions under the Commerce Clause because of their facially disparate treatment of California dairy farmers and dairy farmers located outside the State.

The Commerce Clause prohibits States from engaging in "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *West Lynn Creamery*, 512 U.S. at 192. On several occasions, the Court has held that state milk marketing regulations ran afoul of that prohibition. See, *e.g.*, *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361, 375-379 (1964); *H.P. Hood & Sons* v. *Du Mond*, 336 U.S. 525 (1949); *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). Most recently, in *West Lynn Creamery*, the Court struck down a Massachusetts regulation that required milk handlers to pay an assessment on all milk that they sold to retailers, whether the handlers purchased the milk from in-state or out-of-state dairy farmers, although the entire assessment was distributed to in-state dairy farmers. The Court assumed that "[a] pure subsidy [for Massachusetts dairy farmers] funded out of general revenue" would not violate the Commerce Clause. 512 U.S. at 199. The court held, however, that the Massachusetts regulation violated the Commerce Clause, because the subsidy went exclusively to Massachusetts dairy farmers, yet was "funded principally from taxes on the sale of milk produced in other States." *Ibid.*

The California pricing and pooling laws at issue here may raise somewhat similar concerns under the Commerce Clause. For example, a California handler that purchases raw milk for processing into fluid milk typically must account to the equalization pool for the difference between the quota or overbase price (*i.e.*, the two blend prices that California dairy farmers are guaranteed for their milk) and the ordinarily higher Class 1 price. In effect, therefore, that handler writes two checks for each milk purchase—one to the dairy

farmer that produced the milk and one to the pool. After the 1997 amendments, the handler must do so whether the milk came from a California dairy farmer or an out-of-state dairy farmer. The funds in the pool are then distributed to handlers of other classes of milk—those priced below the quota and overbase blend prices—to compensate them for paying those prices to California dairy farmers. Thus, the equalization payments are provided to handlers exclusively with respect to milk purchases from California dairy farmers, but are collected from handlers with respect to milk purchases from both California and out-of-state dairy farmers.

The lower courts did not address the merits of petitioners' Commerce Clause challenge to the California pricing and pooling laws, having concluded that such a challenge was foreclosed by Section 7254. The constitutionality of those laws under the Commerce Clause is thus not among the Questions Presented in the petitions. In such circumstances, if the Court were to grant certiorari and reverse on the Section 7254 question, it would be appropriate to remand the underlying Commerce Clause question for consideration by the lower courts in the first instance.

3. It is a close question whether the court of appeals' erroneous holding with respect to the scope of Section 7254 warrants this Court's review. The Court ordinarily does not grant certiorari "when the asserted error consists of * * * the misapplication of a properly stated rule of law." Sup. Ct. R. 10. The court of appeals correctly identified the rule that Congress must make "unmistakably clear" any intent to exempt a state law from the Commerce Clause. *Shamrock*, 146 F.3d at 1180 (quoting *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 408 (1994) (O'Connor, J., concurring), and *South-Central Timber*, 467 U.S. at 91) (Pet. App. A30). Its error was in misapplying that rule here.

Petitioners do not identify any conflict among the circuits with respect to the standard for determining whether Con-

gress has exempted a state law from the Commerce Clause. Nor is any circuit conflict likely to arise with respect to the application of that standard to Section 7254, which concerns only California's "law[s], regulation[s], or requirement[s]," and not those of any other State. Neither the federal milk marketing orders promulgated under the AMAA nor the milk marketing regulations of any other State contain provisions similar to those at issue here.

To be sure, this Court has considered Commerce Clause challenges to state regulations in the absence of an asserted conflict among the federal or state appellate courts. See, *e.g.*, *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564 (1997); *General Motors Corp.* v. *Tracy*, 519 U.S. 278 (1997); *Trinova Corp.* v. *Michigan Dep't of Treasury*, 498 U.S. 358 (1991). The petitions in those cases, however, presented a constitutional question of at least potential significance in other States, whereas the petitions in this case present a question concerning the construction of a federal statute that applies only to California milk regulations.

At the same time, it is relevant to the appropriateness of review that the court of appeals clearly erred in its construction of Section 7254 and that the result of its error is to shield from Commerce Clause scrutiny not only the 1997 amendments to California's pricing and pooling plan, but also any revisions to the plan that California may make in the future. Indeed, petitioners assert (01-950 Pet. 13) that the court of appeals' decision "has the potential for a significant impact on the future course" of federal milk programs. The United States Department of Agriculture, however, has not detected any such impact to date. The decision has no direct effect on the regulation of milk under the federal milk marketing orders. At least to this point, the Department has not found that the operation of the California milk pricing and pooling plan, as amended in 1997, has resulted in the uneconomic movement of milk on a regional or national basis, or

has had other adverse effects on the federal program that the Department administers.[5] If in the future the decision proves to have the adverse consequences that petitioners predict, perhaps as a result of further amendments to California's pricing and pooling plan, this Court could grant review in another case at that time. Alternatively, Congress could exercise its power under the Commerce Clause to address those consequences.

On balance, therefore, the United States does not believe that the court of appeals' interpretation of Section 7254, although erroneous, warrants the Court's review at this time. If, however, the Court were to conclude otherwise, this case is a suitable vehicle in which to address the scope of that provision.

II. THE COURT OF APPEALS' F DING THAT CALIFORNIA'S MILK PRICING AND POOLING PLAN DOES NOT VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE DOES NOT WARRANT THIS COURT'S REVIEW

The court of appeals' rejection of petitioner's Privileges and Immunities Clause challenge to the California pricing and pooling laws also does not warrant this Court's review. The court ruled that most of the parties could not assert a claim under that Clause, because they are corporations, not individuals. Pet. App. A13. Petitioners do not seek review of that ruling. Instead, petitioners contend that the court of

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[5] According to statistics compiled by CDFA, out-of-state dairy farmers have continued to ship substantial quantities of raw milk into California since the 1997 amendments to the California pricing and pooling plan. In January 1997, before the amendments, approximately 64 million pounds of milk were shipped into California. In January 2001, approximately 53 million pounds were shipped into California, and in January 2002, approximately 87 million pounds were shipped into California. See CDFA, *California Dairy Information Bulletin* 10 (Oct. 2002) <http://www.cdfa.ca.gov>; CDFA, *California Dairy Information Bulletin* 10 (Feb. 1999).

appeals erred in ruling that a state law cannot violate the Clause unless it discriminates on its face based on citizenship or residency. See 01-1018 Pet. 17-23.

Petitioners misread the court of appeals' opinion. The court's reasoning did not, as petitioners suggest, turn on whether California's pricing and pooling laws discriminate on their face, rather than only in their impact. Instead, the court reasoned that the classifications created by those laws are based not on where dairy farmers reside, but on "the location where milk is produced," and do not violate the Privileges and Immunities Clause for that reason. Pet. App. A14. That holding, which turns on the interpretation of unique provisions of state law, does not present a question of general significance that merits this Court's review.[6]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
BARBARA MCDOWELL
Assistant to the Solicitor General
MARK B. STERN
ARA B. GERSHENGORN
Attorneys

DECEMBER 2002

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[6] Nor does the Ninth Circuit's decision in this case "conflict," as petitioners assert (01-1018 Pet. 23), with the Third Circuit's decision in *Tolchin* v. *Supreme Court*, 111 F.3d 1099, cert. denied, 522 U.S. 977 (1997). In *Tolchin*, as here, the court of appeals held that the provision at issue did *not* discriminate on the basis of residency in violation of the Privileges and Immunities Clause. See 111 F.3d at 1113.

(7) (5)

Nos. 01-950, 01-1018

Supreme Court U.S.
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In the Supreme Court of the United States

HILLSIDE DAIRY, INC., A&A DAIRY, L&S DAIRY, and MILKY WAY FARMS,

Petitioners,

v.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, and ROBERT TAD BELL, Undersecretary, Department of Food & Agriculture, State of California,

Respondents.

PONDEROSA DAIRY, PAHRUMP DAIRY, ROCKVIEW DAIRIES, INC., and DARREL KUIPER and DIANE KUIPER, D/B/A D. KUIPER DAIRY,

Petitioners,

v.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, and ROBERT TAD BELL, Undersecretary, Department of Food & Agriculture, State of California,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

LAWRENCE S. ROBBINS
ROY T. ENGLERT, JR.
ROBBINS, RUSSELL, ENGLERT ORSECK & UNTEREINER LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

CHARLES M. ENGLISH, JR.*
WENDY M. YOVIENE
THELEN REID & PRIEST, LLP
701 Pennsylvania Ave., N.W.
Suite 800
Washington, D.C. 20004
(202) 508-4000

* *Counsel of Record, 01-950*

(Additional counsel listed on inside front cover)

21 pp

JOHN H. VETNE
15 Powow St.
Amesbury, MA 01913
(978) 388-2480

RICHARD HESSE**
2 White Street
Concord, NH 03301
(603) 228-1541

** *Counsel of Record, 01-1018*

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SUPPLEMENTAL BRIEF FOR PETITIONERS IN RESPONSE TO BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Pursuant to Rule 15.8 of the Rules of this Court, petitioners submit this brief in response to the Brief for the United States as Amicus Curiae, filed December 4, 2002.

The Solicitor General agrees with petitioners on numerous key aspects of this case:

- The Solicitor General agrees (U.S. Br. 10-11, 13-15) that the Ninth Circuit erred in *Shamrock Farms Co.* v. *Veneman*,[1] 146 F.3d 1177 (9th Cir. 1998) (Reinhardt, J.), cert. denied, 525 U.S. 1105 (1999). Specifically, the Solicitor General observes that 7 U.S.C. § 7254 does not provide California with *any* immunity from Commerce Clause scrutiny through its direction not to "construe" any "provision of law" to limit specified California nutritional and labeling requirements.

- The Solicitor General agrees (U.S. Br. 11-13) that the Ninth Circuit further erred in the decision below – even if *Shamrock* was correctly decided – by extending California's immunity to cover *all* of California's pricing and pooling regulations, rather than to cover only the kinds of laws identified in the text of 7 U.S.C. § 7254.

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[1] Ann M. Veneman, the named defendant (in her official capacity) who successfully defended California's programs in *Shamrock*, was also the original lead defendant in the cases below. Ms. Veneman is now the U.S. Secretary of Agriculture. Respondents are among her successors as officials of the California Department of Food and Agriculture. Petitioners note that the Solicitor General's brief ascribes views to the U.S. Department of Agriculture but is not signed by any attorneys from the U.S. Department of Agriculture.

- The Solicitor General agrees (U.S. Br. 15-16) that the challenged "California milk pricing and pooling laws, at a minimum, raise substantial questions under the Commerce Clause because of their facially disparate treatment of California dairy farmers and dairy farmers located outside the State."

- The Solicitor General agrees (U.S. Br. 18) that, armed with the immunity conferred by the erroneous decisions in *Shamrock* and *Ponderosa*, California has "shield[ed]" its pricing and pooling laws "from Commerce Clause scrutiny."

- The Solicitor General agrees (U.S. Br. 18) that, in view of the erroneously conferred immunity, California could engage in future Commerce Clause violations through its pricing and pooling programs, which only this Court could correct, because the only lower federal courts with jurisdiction would be bound to follow those erroneous precedents.

- The Solicitor General agrees (U.S. Br. 18) that this Court regularly grants certiorari in Commerce Clause cases without a square conflict in the circuits on the exact question presented.

- And the Solicitor General agrees (U.S. Br. 19) that "this case is a suitable vehicle in which to address" the legal difficulties posed by the Ninth Circuit's decisions immunizing California's milk laws from Commerce Clause scrutiny.

Nevertheless, while acknowledging (U.S. Br. 17) that it is "a close question," the Solicitor General urges denial of certiorari. He does so principally on two grounds: (1) no "circuit conflict" is "likely to arise with respect to the application of [this Court's clear-statement] standard with respect to Section 7254, which concerns only California's 'law[s], regulation[s], or requirement[s]'" (U.S. Br. 18); and (2) the errors

below, as measured by the perceived impact of the contested 1997 state pricing and pooling amendments alone, have not *yet* – so far as the U.S. Department of Agriculture (USDA) has "detected * * * to date" – had any adverse effect on the federal milk program (U.S. Br. 18-19). The first point, though factually accurate, is more reason, not less, for a grant of certiorari. The second point suffers from both factual inaccuracy – as confirmed by other USDA publications – and insufficiency as a basis for denial of certiorari.

1. The certiorari petitions in this case presented numerous conflicts in analysis between the decision below and decisions of this Court and other circuits. See, *e.g.*, 01-950 Pet. 17-21; 01-1018 Pet. 16-17, 22. Those conflicts present more than a sufficient basis for a grant of certiorari to review the erroneous decision below. Even if the Solicitor General is right, however, to focus solely on the impossibility of a square circuit conflict *with respect to Section 7254*, that only means that the need for review by this Court is especially urgent.

Last Term, for example, this Court reversed a decision of the Federal Circuit in *United States Postal Service* v. *Gregory*, 534 U.S. 1 (2001). As a major reason why this Court should grant certiorari, the Solicitor General's certiorari petition argued: "As a result of the Federal Circuit's exclusive jurisdiction over appeals from decisions of the MSPB * * *, the issue in this case is unlikely to be presented to any other court of appeals." Petition for a Writ of Certiorari at 6, *United States Postal Service* v. *Gregory*, 534 U.S. 1 (2001) (No. 00-758) <http://www.usdoj.gov/osg/briefs/2000/2pet/7pet/2000-0758.pet.aa.pdf>. The exclusive jurisdiction of a single circuit over an issue, coupled with the importance of that issue and the erroneous nature of the decision below, was presented (successfully) as a reason to grant certiorari – not, as in the Solicitor General's brief in the present case, as a reason to deny.

The respondent in *Gregory*, like the Solicitor General in this case (U.S. Br. 19), suggested that an intrepid litigant could

simply raise the issue again in a future case and preserve it all the way up to this Court for review. The Acting Solicitor General did not react well to that suggestion. She stated that "it will be difficult for an agency to challenge the MSPB's refusal in a subsequent case to consider" the issue and that the hypothetical future case that might bring the issue before this Court would leave this Court "without the benefit of a court of appeals' decision fleshing out the case, and the absence of such a decision would make such a case less appropriate for review than this one." Reply Brief for the Petitioner at 8-9, *United States Postal Service* v. *Gregory*, 534 U.S. 1 (2001) (No. 00-758) <http://www.usdoj.gov/osg/briefs/2000/2pet/7pet/2000-0758.pet.rep.pdf>. So too here – where private litigants with limited resources would have to pursue hopeless litigation at the district court and court of appeals levels just to preserve the hope of review in this Court after this Court had already denied petitions in both *Shamrock* and *Ponderosa* – it is simply not realistic to suggest (U.S. Br. 19) that, if the present petitions are denied, the future will present a better chance for review of this issue than the present cases.

The Solicitor General's approach in *Gregory* and other Federal Circuit cases, not his approach in the present case, is the correct one: important errors of federal law should not go uncorrected just because they can arise in only one circuit. The impossibility of development of a square circuit conflict (in the narrow sense the Solicitor General embraces) only heightens the need for review by this Court without awaiting a conflict that can never develop.

Exempting an entire California regulatory program in a vital national industry from the Commerce Clause (indeed, under the logic of *Shamrock*, from the entire Federal Constitution and all treaties) is no small thing. When a California regulatory program has been struck down under the Constitution, this Court has been willing to grant certiorari even to review a *correct* Ninth Circuit decision, even though "the decision of the

Court of Appeals [wa]s consistent with the views of other federal courts that ha[d] addressed the issue." *Saenz* v. *Roe*, 526 U.S. 489, 498 (1999), aff'g *Roe* v. *Anderson*, 134 F.3d 1400 (9th Cir. 1998); see also *Anderson* v. *Green*, 513 U.S. 557 (1995) (per curiam) (prior grant of certiorari to address same issue, also in the absence of a circuit conflict). The Court in *Saenz* noted California's importance as "one of the largest, most populated, and most beautiful States in the Nation." 526 U.S. at 492. If correct decisions sustaining constitutional attacks on important California programs merit this Court's review, then erroneous decisions upholding important California programs against constitutional attack merit review as well. See also *Barclays Bank PLC* v. *Franchise Tax Board*, 512 U.S. 298 (1994) (reviewing, and affirming, state-court decision upholding California tax against Commerce Clause challenge).

2. The Solicitor General is likewise mistaken in urging this Court to withhold a grant of certiorari until some later date when USDA "detect[s]" the "future * * * adverse consequences" of the Ninth Circuit's errors. U.S. Br. 18-19. For one thing, as discussed below, the States of Minnesota, Nevada, and Wisconsin have already detected adverse consequences for their dairy industries. The future is now. As the Solicitor General correctly recognizes, the *current* California milk pricing and pooling laws already "raise substantial questions under the Commerce Clause" (U.S. Br. 15-16); yet the Ninth Circuit's decision shields those insular policies from any constitutional scrutiny at a time when petitioners, three States, and the entire processing industry in California have expressed concerns about the impacts of those policies.

It appears that USDA, in advising the Solicitor General, focused on a much narrower issue than the ones raised in the certiorari petitions, *i.e.*, the question whether California's 1997 pooling amendment adversely affects the Department's administration of the federal milk order program. U.S. Br. 18-19. But that point is not in question. Petitioners understand that

minimum prices can be administered at high levels or low ones. The Solicitor General did not address or dispute broader concerns raised by petitioners and the States of Minnesota, Nevada, and Wisconsin about the significant impacts of California's milk policies on dairy farmers and consumers. Those broader concerns have been acknowledged in official USDA publications.

USDA's pricing formulas have reflected and will continue to reflect California's pricing because of differences in California's pricing policies, the sheer size of the California dairy industry, and the need to maintain relative price alignment throughout the country. 65 Fed. Reg. 20094, 20096 (April 14, 2000). In a recent formal rulemaking regarding the proper price levels for raw milk used to produce manufactured dairy products, USDA had no trouble detecting an impact from the California scheme:

> [T]he Federal order program has and will continue to *reflect California's impact on dairy product prices* while establishing [cheese, butter, and nonfat dry milk] prices that are reflective of national supply and demand conditions.

67 Fed. Reg. 67906, 67937 (Nov. 7, 2002) (emphasis added).

As explained in USDA pricing decisions and in the petitions (01-950 Pet. 4-5, 12-13; 01-1018 Pet. 7), the market value of California milk products has had a powerful impact on the level of federally regulated minimum raw milk prices and the structure of federal milk pricing regulations. 67 Fed. Reg. 67906, 67937 (Nov. 7, 2002); 64 Fed. Reg. 16026-01, 16100-01 (April 2, 1999); 58 Fed. Reg. 58112, 58125 (Oct. 29, 1993). By encouraging California dairy producers to expand their production, that State has managed to depress milk and milk product prices across the country, causing "dairy farm exits"

and accelerated milk cow slaughter.[2] As one well-known milk economist succinctly put it: "More milk, more cheese, more butter, and lower milk prices!" Kenneth Bailey, *Dairy Market Outlook* (Pennsylvania State University, Nov. 22, 2002) <http://dairyoutlook.aers.psu.edu>.

Moreover, the Solicitor General considerably understates the adverse practical impacts of this issue for other States. California is an enormous player in a national – indeed, international – dairy market. Policies designed to protect California dairy farmers, if insulated from constitutional review, affect dairy farmers everywhere. That is why this Court has already heard, by way of amicus filings, from the State of Nevada and the Dairy Institute of California. That is why the Secretary of Agriculture for Wisconsin and the Commissioner of Agriculture for Minnesota wrote a detailed joint letter to the Solicitor General (App., *infra*, 1-7) expressing the serious competitive consequences for their dairy industry arising from California's pricing and pooling policies. Those state officials have had no trouble "detecting" the impact of California's protectionist legislation. As the Wisconsin and Minnesota letter states

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[2] See Economic Research Service, USDA *Livestock, Dairy & Poultry Outlook*/LDP-M-98/August 15, 2002, at 6 <http://www.ers.usda.gov/publications/so/>; see also LDP-M-95/May 29, 2002, at 1. The 1997 pooling amendments directly at issue in this case are just one part of a larger package of protective regulations that have stimulated California's dairy expansion at the expense of the rest of the country for decades. Since the third quarter of 1997, when the contested pooling rules took effect, California's inventory of dairy cows has grown by 259,000 cows. During the same period the other States lost 336,000 cows, more than a third of which were lost by the State of Wisconsin. National Agricultural Statistics Service (NASS), USDA, *Milk Production* (monthly 1997-2002) <http://www.usda.gov/nass/>; NASS, USDA, *U.S. Dairy Herd Structure* (Sept. 26, 2002) <http://jan.mannlib.cornell.edu/reports/nassr/livestock/dairy-herd/specda02.pdf>.

plainly: "California has clearly used its pricing and pooling regulations for strategic purposes." App., *infra*, 4; see also *Paul* v. *United States*, 371 U.S. 245, 252 (1963) (observing almost 40 years ago that "California policy, as respects milk, effectively eliminates competition").

All of this is another way of saying that, whether or not USDA's ability to administer the federal program is unaffected, the results of that administration are indisputably and significantly altered by California's ability to insulate its system and adversely affect (lower) national prices for cheese, butter, and nonfat dry milk – as outlined in the letter from the Wisconsin and Minnesota agriculture officials (App., *infra*, 4-6).

In the absence of a clear congressional command, California should not be free to exact these consequences without constitutional scrutiny. Yet, as the Solicitor General acknowledges, that is exactly what the Ninth Circuit – in what is now well-entrenched case law – erroneously permits. There is no reason to await further mischief.

CONCLUSION

For the reasons stated above, as well as those previously stated in the petitions, reply briefs, and amicus briefs, the petitions for writs of certiorari should be granted.

Respectfully submitted,

LAWRENCE S. ROBBINS
ROY T. ENGLERT, JR.
ROBBINS, RUSSELL, ENGLERT
ORSECK & UNTEREINER LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

CHARLES M. ENGLISH, JR.*
WENDY M. YOVIENE
THELEN REID & PRIEST, LLP
701 Pennsylvania Ave., N.W.
Suite 800
Washington, D.C. 20004
(202) 508-4000

* *Counsel of Record, 01-950*

JOHN H. VETNE
15 Powow St.
Amesbury, MA 01913
(978) 388-2480

RICHARD HESSE**
2 White Street
Concord, NH 03301
(603) 228-1541

** *Counsel of Record, 01-1018*

DECEMBER 2002

APPENDIX

State of Wisconsin
Scott McCallum, Governor

Department of Agriculture, Trade and Consumer Protection
James E. Harsdorf, Secretary

June 12, 2002

The Honorable Theodore B. Olson
Solicitor General
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Subject: Impacts of California State Milk Pricing and Pooling Regulations on Minnesota and Wisconsin Dairy Industries: Hillside Dairy v. Lyons, No. 01-950 and Ponderosa Dairy v. Lyons, No. 01-1018

These comments are being offered to assist you in responding to the Supreme Court's request for information on the Hillside Dairy et al. v. Lyons et al. and Ponderosa Dairy v. Lyons et al. cases (Petition Nos. 01-950 and 01-1018). We understand that the issue before the Supreme Court is whether California's pooling regulations are exempt from Commerce Clause scrutiny because of Section 144 of the 1996 Farm Bill. The States of Wisconsin and Minnesota do not believe that Section 144 can properly be extended to apply to other California milk regulations. In fact, our states had representatives involved in the formulation of the 1996 Farm Bill who had no reason to believe that the provision was intended to reach California's regulations relating to raw milk.

While we are not writing to provide you with a legal analysis of the statutory construction of Section 144, the States of Wisconsin and Minnesota want you to know that the outcome of these cases will have significant ramifications for

our dairy industries' ability to compete effectively and fairly for national milk and dairy markets. Thus, the States of Wisconsin and Minnesota respectfully suggest that these cases raise issues of national significance and should receive the attention of the Supreme Court. **Our position is that California should be prohibited from using their state pooling provisions under California regulations to restrict commerce involving outside milk.**

Our interests in the case lie in the economic and public significance of the dairy industries in the States of Minnesota and Wisconsin. There are 26,000 dairy farms in Minnesota and Wisconsin. These farms represent 27.6 percent of the nation's total dairy farm numbers and they produce 18.7 percent of the nation's milk.

In contrast, California's 2,195 dairy farms produce about 19.2 percent of the nation's milk. California also produces 18 percent of the nation's cheese while Minnesota and Wisconsin produce 33.3 percent. **Because of California's size in the dairy industry, their state milk pricing and pooling policies have direct impacts on national dairy markets and the interstate commerce upon which such markets rely.**

Milk and dairy products, such as cheese and butter, are sold in a highly competitive national market place. Milk and dairy products are transported long distances, often coast to coast, between production and processing locations and final sales outlets. Every state relies on interstate sales to balance the supply and demand of fluid milk and dairy products.

Milk pricing is highly regulated so as to ensure that consumers enjoy an adequate supply of milk and that dairy farmers are protected from disorderly marketing conditions. The primary vehicle for regulating milk pricing and pooling

regulations across the US currently and for decades has been the federal milk marketing order program, which is authorized under the Agricultural Marketing Agreement Act of 1937. Pub. L. No. 75-137, 296, 50 Stat. 246-249 (1937) (codified in scattered sections of 7 U.S.C.). **Federal law was used since 1937 to regulate milk pricing and pooling because of the interstate nature of milk movements.**

Historically, because of geographic isolation and a formerly contained dairy industry, California used state law to regulate milk pricing and pooling. The state's approach, as California's dairy industry has grown, has provided their dairy industry unique advantages relative to federal milk marketing orders, which apply only to specific geographic areas and only upon approval by producers in that area.

Many states in the past have tried to regulate milk pricing primarily to protect or benefit their states' farmers only to have failed repeatedly after successful court challenges. Minnesota was the most recent failed attempt with state regulation of milk pricing, which was struck down by the courts on interstate commerce grounds in 1993. Marigold Foods, Inc. v. Redalen, 834 F. Supp. 1163 (D. Minn. 1993).

California has been the significant exception in maintaining a pervasive price and pooling regulation outside of the federal milk marketing order program. This has occurred despite the state's tremendous growth in milk, cheese and nonfat dry milk production and their huge impact on the nation's dairy industry. California's reach and impacts on the dairy industry is so great that many industry persons suggest that what goes in California so goes in the rest of the US. The question is how long can California's state milk pricing and pooling regulations be allowed to create inequities for

the nation's dairy industry and the federal programs on which the dairy industry depends.

Every objective observer of the dairy industry recognizes that no state's milk market can be isolated economically in today's dairy industry and that regulatory, technical or economic changes in one area of the dairy industry affects all other areas. California has clearly used its pricing and pooling regulations for strategic purposes.

The attached March 1997 newsletter of California's Milk Producers Council recognizes the impacts of California's pricing of butter and nonfat dry milk powder on federal milk marketing order markets and California regulator's efforts to use high fluid milk pricing to compensate for their lower pricing for manufactured dairy products. In the newsletter it is stated that: " California's Class 4a butter/powder pricing have wreaked havoc on the orderly functioning of the minimum pricing programs in federal orders. The fact that California gave its butter/powder makers the ability to buy milk cheaper than their competition in the rest of the country forced USDA to create a separate Class for powder in federal orders so that their butter-powder plants could compete."

Regarding California regulators' use of the Class 1 pricing to offset lower prices for milk used in making manufactured products, the newsletter states: "By 1994, rather than correct the inadequate Class 4 price, CDFA substantially increased the Class 1 price which together with a newly established $1.70/cwt. fixed quota differential obtained this needed revenue for the overbase producer. In effect, we have tried to compensate for our low Class 4 prices by substantially raising the Class 1 price."

In recognition of CDFA's lesser willingness by 1997 to inflate Class 1 prices to subsidize low Class 4 prices, the Milk Producers Council began advocating a federal order for California both to improve prices for manufactured dairy products and to address out-of-state milk inroads in California markets which they objected to because of the impact on the pool revenues available to California dairy farmers. In 1997 CDFA changed their pooling provisions to further restrict out-of-state milk and thereby enhance the economic positions of dairy producers in California. The producers dropped their interest in exploring federal orders once CDFA tightened the restrictions on outside milk.

California's ability to manipulate its own regulations has held the rest of the country hostage. In their report (An Economic Evaluation of Basic Formula Price Alternatives- AFPC Working Paper 97-2, June 1997) to USDA for the 1995 Farm Bill's directive to reform federal milk marketing orders, a committee of university experts on milk pricing from around the US, known as the BFP University Study Committee, addressed the issue of California's impacts on federal milk order pricing.

They stated that: "Coming to grips with the Class IIIA issue requires that Federal Milk Marketing Order (FMMO) system and California state dairy policies be coordinated....However, if California fails to become part of the FMMO system and continues to maintain its current four Class pricing policy, USDA may have no alternative but to recommend four federal order Classes with an upcharge for NFDM used to make soft products and cheese...Absent such a regulation there would be incentives to locate soft product and cheese plants in California to take advantage of lower ingredient price and gain a competitive edge in dairy product markets."

In USDA's proposal to reform federal milk marketing orders (Federal Register/Vol. 64. No. 63/ Friday, April 2, 1999/ Proposed Rules-page 16109-16118), one of the criteria used to establish Class I (fluid milk) pricing under federal orders was to "Facilitate orderly marketing with coordinated system of prices." The decision goes on to say: "A system of Class I prices needs to be coordinated on a national level" and that "in supplying milk for manufactured products, demand for manufactured products influences a market's ability to procure milk for Class I needs...the adopted Class I pricing structure appropriately considers all uses of milk as a national Class I price structure." California dairy supply and demand factors has to be used by USDA to establish federal order prices nationally even though USDA could not include California as a federal order.

We cite these references to show that California's milk pricing regulations are hugely impactful on the nation's dairy industry as well as on federal regulations. California producers recognize this fact. While Minnesota and Wisconsin do not directly ship fluid milk into [California], California's ability to restrict such movements from other states is inherent to their ability to create advantages for their entire cheese, butter and nonfat dry milk manufacturers relative to our own. The result directly disadvantages our dairy industries abilities to compete fairly with California. Therefore, we encourage you to recognize the broad importance and impacts of the Hillside and Ponderosa Dairy Petitions as you prepare to provide information to the Supreme Court.

If you need additional information, please contact me at 608/224-5015 or Will Hughes, my dairy policy director, at 608/224-5142. Thank you for your consideration.

Sincerely

/s/
James E. Harsdorf
Secretary
Wisconsin Dept. of
Agriculture, Trade and
Consumer Protection

/s/
Gene Hugoson
Commissioner
Minnesota Dept. of
Agriculture

cc

Edwin S. Kneedler, Deputy Solicitor General
Barbara McDowell, Assistant to the Solicitor General
M. Bradley Flynn, Office of General Counsel, USDA

[attachment omitted in printing; all emphases are in the original]

Nos. 01-950, 01-1018

FILED
24
FEB 24 2003
OFFICE OF THE CLERK

In the Supreme Court of the United States

HILLSIDE DAIRY, INC., ET AL.,

Petitioners,

v.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, ET AL.,

Respondents.

PONDEROSA DAIRY, ET AL.,

Petitioners,

v.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

CHARLES M. ENGLISH, JR.
THELEN REID & PRIEST, LLP
701 Pennsylvania Av., N.W.
Suite 800
Washington, D.C. 20004
(202) 508-4000

Counsel of Record, 01-950

RICHARD HESSE
2 White Street
Concord, NH 03301
(603) 228-1541

Counsel of Record, 01-1018

Counsel for Petitioners

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
RICHARD M. FRANK
Chief Assistant Attorney General
BRUCE F. REEVES*
Deputy Attorney General
**Counsel of Record*
1300 I Street
P.O. Box 944255
Sacramento, CA 95244-2550
(916) 323-1996

Counsel for Respondents

PETITIONS FOR CERTIORARI FILED DECEMBER 26, 2001
CERTIORARI GRANTED JANUARY 10, 2003

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear at the pages indicated in the appendix to the Petition for a Writ of Certiorari in No. 01-950:

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for the Ninth Circuit, dated August 9, 2001 ..... A1

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dated July 21, 1999 ..... A16

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for the Ninth Circuit, dated September 24, 2001 ... A59

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

97-CV-1179

HILLSIDE DAIRY, INC, ET AL
v.

VENEMAN, ET AL

RELEVANT DOCKET ENTRIES

DATE	#	DOCKET ENTRY
6/26/97	1	COMPLAINT for other statutes, fee status paid, receipt # 179419, assigned to Judge Garland E. Burrell referred to Magistrate Judge John F. Moulds (chl) [Entry date 06/27/97] [2:97cv1179]
6/27/97	5	MOTION for preliminary injunction by plaintiff Motion Hearing Set for 9am on 7/28/97 (gk) [Entry date 07/01/97] [2:97cv1179]
7/14/97	16	BRIEF IN OPPOSITION by defendant to motion for preliminary injunction by plaintiff [5-1] (chl) [Entry date 07/15/97] [2:97cv1179]

DATE	#	DOCKET ENTRY
7/25/97	30	ORDER by Judge Garland E. Burrell ORDERING related case(s) 2:97-cv-1179 with member cases 2:97-cv-1185 (cc: all counsel) (ndd) [Entry date 07/25/97] [2:97cv1179]
8/12/97	40	ORDER by Judge Garland E. Burrell ORDERING pltfs Ponderosa Dairy's reply to dfts' opposition to motion for preliminary injunction, file 7/28/97, the order striking the document is VACATED [31-1], [29-1]; pltfs' motion for preliminary injunction relief is GRANTED in part and DENIED in part; [4-1], [5-1] (cc: all counsel) (ljr) [Entry date 08/12/97] [2:97cv1179 2:97 cv1185]
8/15/97	41	NOTICE OF MOTION AND MOTION to dismiss by defendant Ann Veneman and A J Yates motion TO BE HEARD by Judge Garland E. Burrell; Motion Hearing Set For 9am on 9/22/97 (gk) [Entry date 08/19/97] [2:97cv1179]
4/1/98	71	AMENDED COMPLAINT [1-1] by Hillside Dairy, Inc in 2:97-cv-01179, A&A Dairy, Inc in 2:97-cv-01179, Milky Way Farm, Inc in 2:97-cv-01179 (kdc) [Entry date 04/03/98] [2:97cv1179]

DATE	#	DOCKET ENTRY
4/20/98	73	NOTICE OF MOTION AND MOTION to dismiss amended complaint by defendant Hearing set for 5/18/98 at 9:00am (chl) [Entry date 4/20/98] [2:97cv1179]
6/3/98	84	SECOND AMENDED COMPLAINT [71-1] by plaintiffs (dd) [Entry date 06/04/98] [2:97cv1179]
8/3/98	96	ORDER by Judge Garland E. Burrell ORDERING motion to dismiss amended complaint by defendant [73-1] GRANTED in 2:97-cv-01179: Plaintiff is granted 20 days to file and serve a second amended complaint (cc: all counsel) (gm) [Entry date 08/03/98] [2:97cv1179 2:97cv1185]
2/8/99	121	STIPULATION AND ORDER by Judge Garland E. Burrell: dft William J Lyons Jr substituted as Secretary of the CA Dept of Food and Ag, party Ann Veneman DISMISSED (cc: all counsel) (dd) [Entry date 02/08/99] [2:97cv1179 2:97cv1185]

DATE	#	DOCKET ENTRY
4/12/99	134	JOINT NOTICE OF MOTION AND JOINT MOTION for summary judgment by plaintiffs in 2:97-cv-01185 and 2:97-cv-012179 motion TO BE HEARD by Judge Garland E. Burrell; motion Hearing Set For 9:00 5/10/99 (dd) [Entry date 04/13/99] [2:97cv1179 2:97cv1185]
4/12/99	150	NOTICE OF MOTION AND MOTION for summary judgment by defendants motion TO BE HEARD by Judge Garland E. Burrell; Motion Hearing Set For 9:00 5/10/99 (dd) [Entry date 04/13/99] [2:97cv1179]
7/22/99	209	ORDER by Judge Garland E. Burrell ORDERING motion for summary judgment by defendants in 2:97-cv-01179 [150-1] and 2:97-cv-01185 [76-1] GRANTED; the Clerk to enter judgment in favor of dft and against pltfs; CASE DISMISSED (cc: all counsel) (dd) [Entry date 07/22/99] [2:97cv1179 2:97cv1185]
8/3/99	210	JUDGMENT entered in favor of dft pursuant to court order issued 7/22/99 by Judge Garland E. Burrell (cc: all counsel) (dd) [Entry date 08/03/99] [2:97cv1179 2:97cv1185]

DATE	#	DOCKET ENTRY
8/12/99	211	NOTICE OF APPEAL by plaintiffs from District Court decision re judgment [210-1] in 2:97-cv-01179 and judgment [172-1] in 2:97-cv-01185 (fee status paid-#193758) (dd) [Entry date 08/13/99] [2:97cv1179 2:97cv1185]
8/23/99	216	NOTICE OF APPEAL by plaintiffs Hillside Dairy, A&A Dairy, L&S Dairy and Milky Way Farms in 2:97-cv-01179 from District Court decision re judgment [210-1] [172-1] (fee status paid) (dd) [Entry date 08/24/99] [2:97cv1179 2:97cv1185]
10/3/01	242	CERTIFIED COPY of judgment from 9th Circuit the decision of the District Court [236-1] is AFFIRMED (cc: all counsel) (kdc) [Entry date 10/05/01] [2:97cv1179]

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

97-CV-1185

PONDEROSA DAIRY, ET AL
v.
VENEMAN, ET AL

RELEVANT DOCKET ENTRIES

DATE	#	DOCKET ENTRY
6/26/97	1	COMPLAINT for declaratory and injunctive relief, fee status paid, receipt # 179435, assigned to Honorable Lawrence K. Karlton; referred to Magistrate Judge Gregory G. Hollows (mc) [Entry date 06/27/97] [2:97cv1185]
6/27/97	4	NOTICE OF MOTION AND MOTION for preliminary injunction by plaintiff Ponderosa Dairy motion TO BE HEARD by Honorable Lawrence K Karlton; Motion Hearing Set for 8/4/97 at 9:00am (dmb) [Entry date 06/30/97] [2:97cv1185]

DATE	#	DOCKET ENTRY
7/21/97	18	BRIEF IN OPPOSITION (RESPONSE) by dfts Ann M Veneman, A J Yates to motion for preliminary injunction by plaintiff Ponderosa Dairy [4-1] (bb) [Entry date 07/22/97] [2:97cv1185]
7/25/97	23	RELATED CASE ORDER by Judge Garland E. Burrell ORDERING related case(s) 2:97cv1179 with member of case 2:97cv1185 reassigned to Judge Garland E. Burrell; motion for preliminary injunction by plaintiff Ponderosa Dairy TO BE HEARD by Judge Garland E. Burrell; Case 2:97cv1185 referred to Magistrate Judge John F. Moulds; Clerk to make appropriate adjustment in the assignment of civil caes to compensate for this reassignment (cc: all counsel) (ndd) [Entry date 07/25/97] [2:97cv1185]

DATE	#	DOCKET ENTRY
8/12/97	35	ORDER by Judge Garland E. Burrell ORDERING pltfs Ponderosa Dairy's reply to dfts' opposition to motion for preliminary injunction, file 7/28/97, the order striking the document is VACATED [31-1], [29-1]; pltfs' motion for preliminary injunction relief is GRANTED in part and DENIED in part; [4-1], [5-1] (cc: all counsel) (ljr) [Entry date 08/12/97] [2:97cv1179 2:97cv1185]
8/15/97	38	NOTICE OF MOTION AND MOTION to dismiss by dfts Ann M Veneman in 2:97-cv-01185, A J Yates in 2:97-cv-01185 ; Motion Hearing Set For (bb) [Entry date 08/18/97] [2:97cv1185]
3/31/98	52	AMENDED COMPLAINT [1-1] by plaintiffs (dmb) [Entry date 04/03/98] [2:97cv1185]
4/16/98	54	NOTICE OF MOTION AND MOTION to dismiss amended complaint by defendant in 2:97-cv-01185 Motion Hearing Set for 5/18/98 at 9:00am (chl) [Entry date 04/17/98] [2:97cv1185]

DATE	#	DOCKET ENTRY
8/3/98	66	ORDER by Judge Garland E. Burrell ORDERING motion to dismiss amended complaint by defendant [73-1] GRANTED in 2:97-cv-01179: Plaintiff is granted 20 days to file and serve a second amended complaint (cc: all counsel) (gm) [Entry date 08/03/98] [2:97cv1179 2:97cv1185]
12/7/98	76	MOTION for summary judgment by defendant Ann M Veneman in 2:97-cv-01185 motion TO BE HEARD by Judge Garland E. Burrell ; Motion Hearing Set For 1/19/99 at 9:00 (supporting documents filed under seal) (gm) [Entry date 12/08/98] [2:97cv1185]
2/8/99	95	STIPULATION AND ORDER by Judge Garland E. Burrell: dft William J Lyons Jr substituted as Secretary of the CA Dept of Food and Ag, party Ann Veneman DISMISSED (cc: all counsel) (dd) [Entry date 02/08/99] [2:97cv1179 2:97cv1185]

DATE	#	DOCKET ENTRY
4/12/99	111	JOINT NOTICE OF MOTION AND JOINT MOTION for summary judgment by plaintiffs in 2:97-cv-01185 and 2:97-cv-012179 motion TO BE HEARD by Judge Garland E. Burrell; motion Hearing Set For 9:00 5/10/99 (dd) [Entry date 04/13/99] [2:97cv1179 2:97cv1185]
4/12/99	130	NOTICE OF MOTION AND MOTION for summary judgment by defendants motion TO BE HEARD by Judge Garland E. Burrell, Motion Hearing Set For 9:00 5/10/99 (dd) [Entry date 04/13/99] [2:97cv1185]
7/22/99	171	ORDER by Judge Garland E. Burrell ORDERING motion for summary judgment by defendants in 2:97-cv-01179 [150-1] and 2:97-cv-01185 [76-1] GRANTED; the Clerk to enter judgment in favor of dft and against pltfs; CASE DISMISSED (cc: all counsel) (dd) [Entry date 07/22/99] [2:97cv1179 2:97cv1185]
8/3/99	172	JUDGMENT entered in favor of dft pursuant to court order issued 7/22/99 by Judge Garland E. Burrell (cc: all counsel) (dd) [Entry date 08/03/99] [2:97cv1179 2:97cv1185]

DATE	#	DOCKET ENTRY
8/12/99	173	NOTICE OF APPEAL by plaintiffs from District Court decision re judgment [210-1] in 2:97-cv-01179 and judgment [172-1] in 2:97-cv-01185 (fee status paid-#193758) (dd) [Entry date 08/13/99] [2:97cv1179 2:97cv1185]
8/23/99	178	NOTICE OF APPEAL by plaintiffs Hillside Dairy, A&A Dairy, L&S Dairy and Milky Way Farms in 2:97-cv-01179 from District Court decision re judgment [210-1] [172-1] (fee status paid) (dd) [Entry date 08/24/99] [2:97cv1179 2:97cv1185]
10/5/01	199	CERTIFIED COPY of judgment from 9th Circuit AFFIRMING the decision of the District Court (cc: all counsel) (kdc) [Entry date 10/05/01] [2:97cv1185]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 99-16981

PONDEROSA DAIRY, ET AL
v.
YATES, ET AL, ET AL

Appeal from: Eastern District of
California (Sacramento)

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
5/15/01	ARGUED AND SUBMITTED TO Joseph T. SNEED, Barry G. SILVERMAN, John W. Sedwick [99-16981, 99-16982] (sm) [99-16981 99-16982]
8/9/01	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Joseph T. SNEED; Barry G. SILVERMAN; John W. Sedwick, author) FILED AND ENTERED JUDGMENT [99-16981, 99-16982] (jr) [99-16981 99-16982]

9/24/01	Filed order (Joseph T. SNEED, Barry G. SILVERMAN & John W. Sedwick).....The petition for rehearing and the peition for rehearing enbanc are denied. [4240210-1] in 99-16981, 99-16982 [99-16981, 99-16982] (jr) [99-16981 99-16982]
10/2/01	MANDATE ISSUED [99-16981, 99-16982] (jr) [99-16981 99-16982]
1/18/02	Rec'd ntc from Supreme Court; petition for certiorari filed. Supreme Court No. 01-1018. Filed on 12/26/01 & on dkt 1/11/02. [99-16981, 99-16982] (jr) [99-16981 99-16982]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 99-16981

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8/9/01	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Joseph T. SNEED; Barry G. SILVERMAN; John W. Sedwick, author) FILED AND ENTERED JUDGMENT [99-16981, 99-16982] (jr) [99-16981 99-16982]

9/24/01	Filed order (Joseph T. SNEED, Barry G. SILVERMAN & John W. Sedwick).....The petition for rehearing and the peition for rehearing enbanc are denied. [4240210-1] in 99-16981, 99-16982 [99-16981, 99-16982] (jr) [99-16981 99-16982]
10/2/01	MANDATE ISSUED [99-16981, 99-16982] (jr) [99-16981 99-16982]
1/18/02	Rec'd ntc from Supreme Court; petition for certiorari filed. Supreme Court No. 01-1018. Filed on 12/26/01 & on dkt 1/11/02. [99-16981, 99-16982] (jr) [99-16981 99-16982]

STATUTORY PROVISIONS

Section 143 of the Federal Agricultural Improvement and Reform Act of 1996 (1996 Farm Bill), Pub. L. No. 104-127, 110 Stat. 888, 915-917 (codified at 7 U.S.C. §§ 7253), provides:

SEC. 143. CONSOLIDATION AND REFORM OF FEDERAL MILK MARKETING ORDERS.

(a) AMENDMENT OF ORDERS—

(1) REQUIRED CONSOLIDATION.—The Secretary shall amend Federal milk marketing orders issued under section 8c of the Agricultural Adjustment Act (7 U.S.C. 608c), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, to limit the number of Federal milk marketing orders to not less than 10 and not more than 14 orders.

(2) INCLUSION OF CALIFORNIA AS SEPARATE ORDER.—Upon the petition and approval of California dairy producers in the manner provided in section 8c of the Agricultural Adjustment Act (7 U.S.C. 608c), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, the Secretary shall designate the State of California as a separate Federal milk marketing order. The order covering California shall have the right to reblend and distribute order receipts to recognize quota value.

(3) RELATED ISSUES ADDRESSED IN CONSOLIDATION.—Among the issues the Secretary is authorized to implement as part of the consolidation of Federal milk marketing orders are the following:

(A) The use of utilization rates and multiple basing points for the pricing of fluid milk.

(B) The use of uniform multiple component pricing when developing 1 or more basic formula prices for manufacturing milk.

(4) EFFECT OF EXISTING LAW.—In implementing the consolidation of Federal milk marketing orders and related reforms under this subsection, the Secretary may not consider, or base any decision on, the table contained in section 8c(5)(A) of the Agricultural Adjustment Act (7 U.S.C. 608c(5)(A)), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, as added by section 131 of the Food Security Act of 1985.

(b) EXPEDITED PROCESS.—

(1) USE OF INFORMAL RULEMAKING.—To implement the consolidation of Federal milk marketing orders and related reforms under subsection (a), the Secretary shall use the notice and comment procedures provided in section 553 of title 5, United States Code.

(2) TIME LIMITATIONS.—

(A) PROPOSED AMENDMENTS.—The Secretary shall announce the proposed amendments to be made under subsection (a) not later than 2 years after the date of enactment of this title.

(B) FINAL AMENDMENTS.—The Secretary shall implement the amendments not later than 3 years after the date of enactment of this title.

(3) EFFECT OF COURT ORDER.—The actions authorized by this subsection are intended to ensure the timely publication and implementation of new and amended Federal milk marketing orders. In the event that the Secretary is enjoined or otherwise restrained by a court order from publishing or implementing the consolidation and related reforms under subsection (a), the length of time for which that injunction or other restraining order is effective shall be added to the time limitations specified in paragraph (2) thereby extending those time limitations by a period of time equal to the period of time for which the injunction or other restraining order is effective.

(c) FAILURE TO TIMELY CONSOLIDATE ORDERS.—If the Secretary fails to implement the consolidation required under subsection (a)(1) within the time period required under subsection (b)(2)(B) (plus any additional period provided under subsection (b)(3)), the Secretary may not assess or collect assessments from milk producers or handlers under such section 8c for marketing order administration and services provided under such section after the end of that period until the consolidation is completed. The Secretary may not reduce the level of services provided under the section on account of the prohibition against assessments, but shall rather cover the cost of marketing order administration and services through funds available for the Agricultural Marketing Service of the Department.

(d) REPORT REGARDING FURTHER REFORMS.—

(1) REPORT REQUIRED.—Not later than April 1, 1997, the Secretary shall submit to Congress a report—

(A) reviewing the Federal milk marketing order system established pursuant to section 8c of the Agricultural Adjustment Act (7 U.S.C. 608c),

reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, in light of the reforms required by subsection (a);

(B) describing the efforts underway and the progress made in implementing the reforms required by subsection (a); and

(c) containing such recommendations as the Secretary considers appropriate for further improvements and reforms to the Federal milk marketing order system.

(2) EFFECT OF OTHER LAWS.—Any limitation imposed by Act of Congress on the conduct or completion of reports to Congress shall not apply to the report required under this section, unless the limitation specifically refers to this section.

Section 144 of the Federal Agricultural Improvement and Reform Act of 1996 (1996 Farm Bill), Pub. L. No. 104-127, 110 Stat. 888, 917 (codified at 7 U.S.C. §§ 7254), provides:

SEC. 144. EFFECT ON FLUID MILK STANDARDS IN STATE OF CALIFORNIA.

Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding—

(1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or

(2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

Section 145 of the Federal Agricultural Improvement and Reform Act of 1996 (1996 Farm Bill), Pub. L. No. 104-127, 110 Stat. 888, 917-918 (codified at 7 U.S.C. §§ 7255), provides:

SEC. 145. MILK MANUFACTURING MARKETING ADJUSTMENT.

(a) MAXIMUM ALLOWANCES ESTABLISHED.—No State shall provide for a manufacturing allowance for the processing of milk in excess of—

(1) $1.65 per hundredweight of milk for milk manufactured into butter and nonfat dry milk; and

(2) $1.80 per hundredweight of milk for milk manufactured into cheese.

(b) MANUFACTURING ALLOWANCE DEFINED.—In this section, the term "manufacturing allowance" means—

(1) the amount by which the product price value of butter and nonfat dry milk manufactured from a hundred pounds of milk containing 3.5 pounds of butterfat and 8.7 pounds of milk solids not fat resulting from a State's yield and product price formulas exceeds the class price for the milk used to produce those products; or

(2) the amount by which the product price value of cheese manufactured from a hundred pounds of milk containing 3.5 pounds of butterfat and 8.7 pounds of milk solids not fat resulting from a State's yield and product price formulas exceeds the class price for the milk used to produce cheese.

(c) EFFECT OF VIOLATION.—If the Secretary determines following a hearing that a State has in effect a manufacturing allowance that exceeds the manufacturing allowance authorized in subsection (a), the Secretary shall suspend purchases of cheddar cheese, butter, and nonfat dry milk produced in that State until such time as the State complies with such subsection.

(d) EFFECTIVE DATE; IMPLEMENTATION.—This section (other than subsection (e)) shall be effective during the period beginning on the first day of the first month beginning after the date of enactment of this title and ending on December 31, 1999. During that period, the Secretary may exercise the authority provided to the Secretary under this section without regard to the issuance of regulations intended to carry out this section.

(e) CONFORMING REPEAL.—Effective on the first day of the first month beginning after the date of enactment of this title, section 102 of the Food, Agriculture, Conservation, and Trade Act of 1990 (7 U.S.C. 1446e-1) is repealed.

Sections 61801-61802 of the California Food and Agriculture Code provide:

61801. The production of market milk is hereby declared to be a business affected with a public interest. The provisions of this chapter are enacted in the exercise of the police powers of this state for the purpose of protecting the health and welfare of the people of this state.

61802. The Legislature hereby declares all of the following:

(a) Market milk is a necessary article of food for human consumption.

(b) The production and maintenance of an adequate supply of healthful market milk of proper chemical and physical content, free from contamination, is vital to the public health and welfare, and the production, transportation, processing, and storage of market milk in this state is an industry affecting the public health.

(c) Because of the perishable quality of milk, the nature of milk production, the varying seasonal production and demand factors, and other economic factors affecting the milk industry, the potential exists for economic disruption, in the absence of regulation, in the production, marketing, and sale of market milk which may constitute a menace to the health and welfare of the inhabitants of this state and may tend to undermine sanitary regulations and standards of content and purity, however effectually the sanitary regulations may be enforced.

(d) Health regulations alone are insufficient to prevent economic disturbances in the production of milk which may disrupt the future supply of market milk and to

safeguard the consuming public from future inadequacy of a supply of this necessary commodity.

(e) It is the policy of this state to promote, foster, and encourage the intelligent production and orderly marketing of commodities necessary to its citizens, including market milk, and to eliminate economic waste, destructive trade practices, and improper accounting for market milk purchased from producers.

(f) It is recognized by the Legislature that the economic factors concerning the production, marketing, and sale of market milk in California may be affected by the national market for milk for manufacturing purposes.

(g) It is recognized by the Legislature that in recent years the supply of manufacturing milk in California, as defined in Section 32509, has consistently declined and continues to decline, and that market milk has virtually supplanted manufacturing milk for manufacturing purposes in this state, and that it is therefore necessary to conform the pricing standards governing minimum producer prices for market milk established under this chapter to current economic conditions.

(h) It is recognized by the Legislature that the levels of retail prices of milk and milk products paid by consumers are affected by a large number of economic and other factors apart from minimum producer prices for market milk established under this chapter, many of which factors are not within the power of the director to regulate or control, particularly since the Legislature repealed provisions concerning establishment of minimum wholesale and retail prices. It is further recognized by the Legislature that, in order to accomplish the purposes of this chapter and to promote

the public health and welfare, it is essential to establish minimum producer prices at fair and reasonable levels so as to generate reasonable producer incomes that will promote the intelligent and orderly marketing of market milk in the various classes, and that minimum producer prices established under this chapter should not be unreasonably depressed because other factors have affected the levels of retail prices paid by consumers.

Sections 62077-62078 of the California Food and Agriculture Code provide:

62077. A handler shall not pay any producer less than the applicable price established for the usage to which the market milk, purchased from him is applied pursuant to accounting procedures established by the director. If the market milk is not applied to any purpose set forth in Article 5 (commencing with Section 61931), then a handler shall not pay any producer less than the lower of the prices established under the applicable stabilization and marketing plan for class 4a and class 4b usage.

62078. All handlers who receive market milk within this state shall be obligated to pay minimum producer prices established under this chapter regardless of the area of origin of such milk, whether inside or outside the jurisdiction of the State of California.

Sections 62700-62704 of the California Food and Agriculture Code provide:

62700. The production and distribution of fluid milk and fluid cream is hereby declared to be a business affected with a public interest. The provisions of this chapter are enacted in the exercise of the police powers of this state for the purpose of protecting the health and welfare of the people of this state.

62701. It is hereby declared that fluid milk and fluid cream are necessary articles of food for human consumption; that the production and maintenance of an adequate supply of healthful milk of proper chemical and physical content, free from contamination, is vital to public health and welfare, and that the production, transportation, processing, storage, distribution and sale of fluid milk and fluid cream in the State of California is an industry, in whole and in part, affecting public health and welfare; that unfair, unjust, destructive and demoralizing trade practices have appeared within this industry and these practices constitute a menace to the health and welfare of the inhabitants of this state by threatening the stability of this industry and by thereby endangering the assurance to the people of the State of California of the maintenance of an adequate supply of this necessary commodity; that it is a policy of this state to promote, foster and encourage the intelligent production and orderly marketing of commodities necessary to its citizens, including fluid milk and fluid cream, and to eliminate speculation, waste, improper marketing, unfair and destructive trade practices, and improper accounting for milk purchased from producers.

62702. It is recognized by the Legislature that currently the powers conferred upon the director by Chapter 2 (commencing with Section 61801) are inadequate to enable the dairy industry to develop and maintain satisfactory marketing conditions and bring about and maintain a reasonable amount of stability and prosperity in the production of fluid milk and fluid cream; and that to accomplish these purposes, and particularly to insure to consumers within California an adequate and continuous supply of pure, fresh, and wholesome milk at fair and reasonable prices, including a reasonable estimate of the additional supply which is needed to provide for normal fluctuations in production and in consumer demand for those products, those powers must be supplemented by the powers conferred in this chapter upon the director to equalize gradually the distribution of class 1 usage among the producers of this state.

62702.1. It is recognized by the Legislature that the provisions for equalization of usages among producers and entry of new producers contained in the Gonsalves Milk Pooling Act, as originally enacted, and the pooling plan adopted thereunder, tended to achieve the purposes of that act; however, the provisions for more rapid equalization and additional new entry would more rapidly and effectively achieve the purposes of this chapter.

It is also recognized that some holders of pool quota and production base initially issued under the Gonsalves Milk Pooling Act have waited for several years for equalization, and that equalized producers have for a number of years not shared in any of the benefits of new quota created by new usage.

It is further recognized that it is necessary to promote and to attempt to assure more rapid equalization of the holders of pool quota issued subsequent to the initial allocation of production bases and pool quota pursuant to this chapter, and to provide for a program for entry and for equalization of new producers.

It is the purpose of the amendments to this chapter to provide a reasonable and equitable mechanism to permit more accelerated equalization, to equalize the holders of pool quota and production base initially issued under the Gonsalves Milk Pooling Act and who are not yet equalized, and to legislatively allocate in a fair and reasonable manner a share of new pool quota created by new usage to existing pool quota holders who are not equalized, to new producers, and to equalized pool quota holders who have not shared in the benefits of the growth of new usage since the original enactment of the Gonsalves Milk Pooling Act and the pooling plan thereunder.

62703. In effectuating the purposes of this chapter, a production base and a pool quota shall be established for each producer pursuant to Section 62707. The establishing of these bases and their functions shall be as provided in the pooling plan formulated by the director pursuant to the provisions of this chapter.

62704. The director is authorized to develop a proposed pooling plan and to designate the proposed areas in which the plan will be made effective. He shall appoint fluid milk producers, and representatives of producers, to be the members and alternate members of a formulation committee, reasonably representative of all producers and areas to be included in the proposed pooling plan, which committee shall advise and assist the director in the establishment of the proposed pooling plan area and in the formulation of the proposed pooling plan. The pooling plan shall include all areas covered by stabilization and marketing plans under Chapter 2 (commencing with Section 61801), except any relatively isolated region of the state may be excluded therefrom, if the director, after a public hearing, finds that the inclusion of the region is not practical or in conformity with the purposes of the pooling plan, or if he finds that the producers in the relatively isolated region do not desire to be a part of either their own or one of the pools.

Section 62711 of the California Food and Agriculture Code provides:

62711. (a) Except as provided in subdivision (h) of Section 62707, each producer shall be paid the highest usage for that amount of his or her fluid milk production that is equal to his or her pool quota and shall be paid the next highest usage for the difference between his or her pool quota and his or her production base under the production pool designated pursuant to this chapter and the lowest usage for all milk produced in

excess of his or her production base under the overproduction pool designated pursuant to this chapter.

(b) In calculating the pool value, the volume of milk that has been classified as restricted use market milk shall be credited to the handler at the class 4a or class 4b price, whichever is lower.

Sections 62716-62717 of the California Food and Agriculture Code provide:

62716. Following the required hearing, the director shall submit the pooling plan to producers concerned for their approval or disapproval in a statewide referendum. The approval or disapproval of individual producers voting in this referendum shall be kept confidential. Each producer shall have one vote and such vote shall be individually cast so that there will be no block voting. The director shall prepare a ballot. The ballot form shall be substantially as follows:

Ballot

Shall the proposed pooling plan be made effective?

Yes ____ No ____

In addition, the ballot shall include a statement of the voter's total production during the calendar month next preceding the month of the commencement of the referendum period, where and to whom such production was sold or otherwise disposed, and the producer's name and address.

The director may reveal the names of producers whose votes have been received to both proponents and opponents of the plan.

The referendum shall be set for a period of 60 days. The director may at his own discretion or upon a proper showing, extend the referendum for a period not to exceed 30 days.

62717. If the director finds that producers on a statewide basis have assented in writing to the proposed pooling plan submitted to them for assent, the director shall place the proposed pooling plan into effect. The director shall find that producers have assented to the plan if he finds on a statewide basis that not less than 51 percent of the total number of eligible producers in the state shall have voted in the referendum and finds one of the following:

(a) Sixty-five percent or more of the total number of eligible producers who voted in the referendum who produced 51 percent or more of the total amount of fluid milk produced in the state during the calendar month next preceding the month of the commencement of the referendum period by all producers who voted in the referendum approve the plan.

(b) Fifty-one percent or more of the total number of eligible producers who voted in the referendum who produced 65 percent or more of the total amount of fluid milk produced in the state during the calendar month next preceding the month of the commencement of the referendum period by all producers who voted in the referendum, approve the plan.

If the plan is not approved, the director may resubmit the plan, or submit a new plan, at any time after six months from the date the director announces the plan was not approved.

The director may amend the plan, after notice and public hearing has been given in the same manner as is provided in Chapter 2 (commencing with Section 61801) for stabilization and marketing plans, if he finds that the amendment is necessary to effectuate the purposes of this chapter. After the hearing, the director, upon his own motion, may make nonsubstantive amendments to the plan. The director may make substantive amendments to the plan only if producers assent to the proposed amendments at a referendum conducted in the same manner and

in the same number as provided for the referendum approving the pooling plan.

The director may terminate the plan on a statewide basis after notice and public hearing has been given in the same manner as is provided in Chapter 2 (commencing with Section 61801) for stabilization and marketing plans, if he finds that the plan is no longer in conformity with the standards described in, or will not tend to effectuate the purposes of, this chapter. The hearing may be held upon the motion of the director, and shall be held upon receipt of a petition signed by producers representing not less than 25 percent of the total number of all producers and not less than 25 percent of the total production of all producers.

The director shall submit the termination of the plan on a statewide basis in a referendum conducted in the same manner as provided for initial approval of the plan if, after notice and public hearing has been given in the same manner as is provided in Chapter 2 (commencing with Section 61801) for stabilization and marketing plans, he finds that a substantial question exists as to whether or not producers desire the plan to continue and shall submit the plan for termination upon receipt of a petition requesting termination signed by producers representing not less than 25 percent of the total number of all producers and not less than 25 percent of the total production of all producers. The plan shall be terminated if termination is favored by the same percentage of producers producing the same amount of fluid milk as required to initiate the plan.

REGULATORY PROVISIONS

CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE

POOLING PLAN FOR MARKET MILK, AS AMENDED, EFFECTIVE JULY 1, 1997

Article 1. Definitions

Section 100. The definitions contained in Chapter 2 and Chapter 3, Part 3, Division 21 of the Food and Agricultural Code govern the construction of this Plan.

Section 101. "Act" shall be known and may be cited as the "Food and Agricultural Code".

Section 102. "Person" means any individual, firm, corporation, partnership, trust, incorporated or unincorporated association, nonprofit cooperative association, nonprofit cooperative marketing association, nonprofit corporation, or any other business unit or organization.

Section 103. "Secretary" means the Secretary of the California Department of Food and Agriculture or any employee of such department duly assigned or delegated to perform the functions required pursuant to this Plan.

Section 104. "Producer" means any person that produces market milk in the State of California from five or more cows.

Section 104.1 "Dairy ranch" and "dairy farm" are synonymous terms and mean a commercial production facility which produces milk.

Section 105. "Handler" means any person functioning in one or more of the following capacities:

(a) A person (other than a cooperative association) who operates one or more pool plants or operates any other plant from which Class 1 milk is disposed of during the month directly or indirectly in the pool area;

(b) A duly incorporated cooperative association of producers which has authority from its individual producer members to market their milk and receive payment therefore and which operates one or more pool plants or operates any other plant from which market milk products are disposed of directly or indirectly during the month in the pool area;

(c) A cooperative association in its capacity as the marketing agent for producer milk with respect to the milk of its member producers which it markets and receives payment therefore under authority of contracts or agreements with its individual members, which milk is not received at a plant operated by the cooperative or diverted therefrom;

(d) A person who operates a milk plant located in the pool area and receives market milk from one or more dairy ranches.

Section 106. "Pool plant" means:

(a) Any handler's milk receiving, processing, bottling, or manufacturing plant located in California from which Class 1 or mandatory Class 2 milk products are disposed of directly or indirectly in the pool area which receives market milk from one or more producers. Any handler with a pool plant qualified under this paragraph shall have the option to have any nonpool plant of that handler treated as either a "pool plant" or a "nonpool plant" for pool accounting purposes.

This option may only be made once in any 12-month period.

(b) Any handler's plant located in California which does not receive market milk from dairy farmers nor claim diversions of such milk, but which processes, packages, or manufactures milk or milk products or imitation milk, if Class 1 or mandatory Class 2 milk products are disposed of from such plant directly to retail or wholesale customers in the pool area. Any handler with a pool plant qualified under this paragraph shall have the option to have any nonpool plant of that handler treated as either a "pool plant" or a "nonpool plant" for pool accounting purposes. This option may only be made once in any 12-month period.

(c) The following plants shall not be deemed to be pool plants and for accounting and settlement purposes shall operate outside of the pool:

(1) The plant of an exempt producer-handler;

(2) The plant of any governmental agency, unless such plant notifies the secretary it has elected to participate in the Pooling Plan no later than 30 days after the effective date of the Plan or 30 days after said plant commences operations. Having been admitted to the pool pursuant to the request, the plant may not subsequently withdraw;

(3) A plant from which Class 1 or mandatory Class 2 milk products are disposed of to retail or wholesale outlets in areas outside the pool area, but not to retail or wholesale outlets (except milk

plants) in the pool area, nor to any pool plant having such dispositions;

(4) Any milk processing plant which is not approved by the appropriate public regulatory or health authority for the handling of market milk, provided that such plant receives no market milk except pool milk transferred or diverted by a handler and provided, further, that such plant notifies the secretary in advance that it chooses not to be a pool plant.

* * * * *

Section 115. "Quota milk" means that amount of fat and solids not fat contained in pool milk delivered by a producer during the month which is not in excess of the pool quota of such producer computed pursuant to Section 110 multiplied by the number of quota eligible days in the month.

Section 115.5 "Quota eligible days" means the number of calendar days in the month as reduced by the following:

(a) The number of days on which a producer (including producer members or patrons of cooperative associations) is degraded as defined in Section 113.3 in accordance with procedures established by an appropriate public regulatory or health authority;

(b) The number of days, on which the secretary agrees, a producer's milk did not meet the quality requirements specified in the producer's contract with the handler and such milk was not sold or used for Class 1 purposes and was otherwise handled in accordance with Section 62715 of the Food and Agricultural Code.

Section 116. "Daily production milk" or "daily base milk" means that amount of pool milk delivered by a producer during the month which is in excess of the pool quota computed pursuant to Section 110 of such producer but not in excess of the production base computed pursuant to Section 108.

Section 116.5 "Production milk" or "base milk" means that amount of pool milk delivered by a producer during the month which is equal to the monthly production base as computed pursuant to Section 108.5, less the amount of quota milk delivered during the month as computed pursuant to Section 115.

Section 117. "Overproduction milk" or "overbase milk" means that amount of pool milk delivered by a producer during the month, exclusive of milk degraded in accordance with procedures established by the appropriate public regulatory or health authority, which does not qualify as quota milk or base milk.

* * * * *

Article 2. Eligibility for a Production Base and Pool Quota

Section 200. The secretary shall compute and establish a production base and pool quota for each producer who produced market milk which was delivered to a plant regulated under one or more of the Stabilization and Marketing Plans effective in the pool area specified in Section 118, during any base period, subject to the following requirements:

(a) If a producer operated more than one dairy farm holding valid market milk permits during any base period, or during the months of December 1966 and January and February 1967 for producers whose production base is computed under Paragraph 108(c) a separate production base and pool quota shall be computed, for

deliveries from each such dairy farm. If such farms were not operated separately for the entire base period selected, they shall be combined for computing base and quota;

(b) Only one production base and one pool quota shall be computed for a single production unit which was jointly owned or operated by one or more persons during any base-forming period;

(c) Producers of certified milk or guaranteed raw milk who qualify under Section 104 shall have the option to be included in the Plan at the time of the adoption of the initial Pooling Plan, provided they so state in an application to the secretary submitted no later than the effective date of the Plan. Admission to the Pooling Plan at a later date by such producers shall be on the basis of the production base and pool quota computed according to the same procedure provided under Section 602, for producer-handlers;

(d) Any person who purchased or otherwise acquired a producer's business or a portion of a producer's business after June 30, 1966, and prior to the effective date of this Pooling Plan, shall succeed to the same proportion of the producer's production base and pool quota, provided that the same rules concerning eligibility for and computation of base and quota amounts shall apply to the business so transferred as though no change in ownership had occurred. For purposes of this paragraph, the term "business" shall be deemed to be the dairy herd and other physical facilities which made up the business transferred, or all or any portion of a market milk supply contract or

allotment which was purchased or otherwise acquired under conditions of continuing performance. The transaction by which the business was acquired shall be fully disclosed and documented on forms provided by and filed with the secretary. Any misrepresentation of facts or falsity in statements by either party shall constitute cause for forfeiture of all or any portion of the production base and pool quota under consideration as purchased or acquired. Any disagreement of the producer with the computation of a base and quota which involves this paragraph shall be referred to the Producer Review Board.

Article 3. Adjustment of Production Base and Pool Quota

Section 300. After August 31 of each year, and prior to January 1 of the following year, the secretary shall determine the actual new daily Class 1 and Class 2 usage of solids not fat for the pool area, if any, as follows:

(a) The Class 1 and Class 2 usage of solids not fat for the most recent September through August 12-month period shall be measured against the Class 1 and Class 2 usage of solids not fat for the previous highest identical 12-month period since the 1988-1989 measurement period;

(b) The Class 1 and Class 2 usage of solids not fat for each 12-month period shall take into consideration the total Class 1 and Class 2 usage generated by the pool, plus that amount which is exempted from pool accountability by producer-handlers operating with an exemption under the provisions of Article 6 or Article 6.5, and further adjusted by the amount of certified raw milk used for Class 1 and Class 2 purposes;

(c) If new Class 1 and Class 2 usage of solids not fat is to be assigned pursuant to this article, a ratio of 1 pound of fat to 2.5 pounds of solids not fat shall be used to determine the new Class 1 and Class 2 usage of fat.

Section 301. The total new Class 1 and Class 2 usage computed in accordance with Section 300, shall be allocated to producers as pool quota as follows:

(a) Forty percent of the new quota shall be available for allocation in accordance with the following provisions:

(1) A factor shall be computed based on the production base and pool quota in effect on December 1 for those producers who have not reached the equalization point, using one of the following methods:

(i) For those producers who meet the one-year production requirement pursuant to Section 352, and who received an initial allocation of quota and production base after December 20, 1976 under the provisions of Article 3.5, a factor equal to 75 percent of currently held production base increased by unissued qualifying period production plus the difference between the currently held production base increased by unissued qualifying period production and pool quota; or

(ii) For all other qualifying producers, a factor equal to 75 percent of the production base plus the difference between the production base and pool quota.

(2) Divide the factor obtained for each producer under Subparagraph 301(a)(1), by the total of the factors obtained for all producers under that Subparagraph;

(3) The result obtained from the computation under Subparagraph 301(a)(2) shall determine the percentage of new pool quota which is available for allocation to each producer. This amount as adjusted by Subparagraph 301(a)(4) shall be assigned to each producer, except that no allocation shall be made to any producer which will result in a pool quota exceeding the equalization point;

(4) If, after these computations, the pool quota of the milk fat or solids not fat component of any producer is less than the equalization point of such producer by no more than 3.5 or 8.5 pounds, respectively, both components shall be increased to the equalization point;

(5) The secretary shall not be obligated to reduce the new quota available for allocation computed pursuant to Paragraph 301(a) by the additional quota assigned pursuant to Subparagraph 301(a)(4), but shall reallocate one time only the residual quota occurring because of a producer reaching

equalization by the operation of Subparagraph 301(a)(3);

(6) Any new pool quota remaining to be assigned after all participating pool quotas have reached the equalization point shall be added to that available under Paragraph 301(b) for assignment.

(b) Forty percent of the new quota, increased by that made available under Subparagraph 301(a)(6) shall be allocated to producers whose total production base and pool quota are equal to or above the equalization point. Each such producer's allocation shall be in the same ratio as that producer's total holdings of quota bears to the total quota holdings of all such producers.

(c) There shall be no forfeiture of any pool quota, including that assigned pursuant to this article, except as provided under Article 5.

Section 302. Producers who qualify under Article 3.5 for participation in new pool quota pursuant to Paragraph 301(a) shall receive additional production base at the lesser of 111 percent of the additional pool quota allocated or their unissued qualifying period production. Producers reaching equalization under this provision will receive additional production base equaling unissued qualifying period production. A producer who qualifies under Article 3.5, will be considered to have reached equalization when quota is equal to or greater than 95 percent of the sum of currently held production base and unissued qualifying period production.

Article 3.5. Allocation of New Producer's Production Base and Pool Quota

Section 350. Twenty percent of total new Class 1 and Class 2 usage computed in accordance with Section 300 shall be available for initial quota allocations to new producers as

defined in Article 4.5. Such allocations shall be made available as of February 1 of each year to new producers who qualify under Article 4.5. This amount shall be added to any previous amount made available pursuant to this section and not allocated.

In addition, any quota which has reverted to the pool, under the provisions of Article 5 shall be allocated on a continuing basis to qualifying new producers. This quota will be accumulated until such time as there is sufficient quota to issue to the next new producer on the priority list under the provisions of Sections 351 and 453. Such quota shall be made available for allocation within 90 days after the quota has reverted to the pool.

Section 351. The new producer's initial allocation shall be:

(a) Pool quota at the lesser of:

(1) 95 percent of the qualifying period production as defined in Section 127, or

(2) An amount determined by multiplying a factor times 150 pounds of fat and 375 pounds of solids not fat. The factor to be used shall be the larger of:

(i) 40 percent;

(ii) The lowest factor obtained by dividing the pool quota solids not fat of each producer who receives an allocation pursuant to Article 3 by that producer's production base of solids not fat.

(b) Production base at the lesser of:

(1) The qualifying period production as defined in Section 127, or

(2) 111 percent of the pool quota allocated.

Section 352. Producers who received an initial allocation under Section 351 shall participate in future allocations under Sections 301 and 302 after a one-year minimum period of continuous production following initial allocation.

Section 353. Any pool quota received pursuant to Sections 351 and 352 shall be subject to the provisions of Article 5.

Section 354. No allocation shall be made to any producer which will result in a pool quota exceeding the equalization point.

Article 4.5. New Producer Entry

Section 450. A new producer, as defined under Section 120, and who qualifies under this article, may make application to the secretary on forms provided to establish eligibility for an allocation of quota. Quota, if available, will be allocated within 90 days following the receipt of the application.

Section 451. To qualify for allocation of new quota, a new producer must:

(a) Obtain a market milk permit from the appropriate California regulatory or health authority prior to making application, and

(b) Have a market milk contract and be shipping to a pool handler prior to making application, and

(c) Have one year of continuous commercial production within the State of California prior to making application, and maintain continuous market milk production until receiving an allocation of new quota, and

(d) Satisfy the requirement that at least 50 percent of the interest in the dairy operation is owned by individuals directly engaged in the management and operation of the dairy, and

(e) Operate a production facility that is completely separate and apart from any other production facility for a minimum of one year prior to making application and until new quota has been allocated, and

(f) Satisfy the requirement that no individual or person may apply for new quota on more than one production facility, and

(g) Operate a production facility under the same ownership percentages as stated in the application for a minimum of one year prior to making application and until new quota has been allocated.

* * * * *

Article 8.1. Adjustment to Handler Obligations for Plant to Plant Transfers

Section 810. Each handler entitled to adjustments for plant to plant transfers, who is located within a supply county, as set forth in Section 300.2 of the Stabilization and Marketing Plans, shall submit a report for each month which shall be postmarked no later than 45 days following the end of the month. Such report shall set forth adjustments to the handler's pool obligation as specified in this article.

Section 811. The following shall be shown for transfers for which a transportation credit is provided for under Section 300.2 of the Stabilization and Marketing Plans:

(a) The pounds and milk fat content of market milk, market skim milk, and market cream transferred in bulk form to each plant located in a county designated as a deficit county under Section 300.2 of the Stabilization and Marketing Plans

and the classification assigned under the provisions of Sections 802 and 812 of the Pooling Plan for Market Milk;

(b) The computation of the transportation credit for market milk and market skim milk (excluding condensed skim milk and market cream) based on the rates in Section 300.2 of the Stabilization and Marketing Plans.

Section 812. Handlers who transfer market milk and market skim milk (excluding condensed skim and market cream) in bulk form from a pool plant located in a county designated as a supply county to another pool plant located in a county designated as a deficit county, as set forth in Section 300.2 of the Stabilization and Marketing Plans, shall be entitled to request the following adjustments provided there is concurrence by the receiving plant:

(a) Market milk and market skim milk (excluding condensed skim milk and market cream) may be reassigned from the original classification, as provided for in Subparagraph 802(a)(3), to Class 1 provided that the total quantity assigned to Class 1 shall not exceed the total Class 1 inplant usage of the receiving plant;

(1) The additional quantity classified as Class 1 shall be deducted on a pro rata basis from the original Class 2, 3, 4a, and 4b classification. The shipping handler will be charged for Class 1 and credited for Class 2, 3, 4a, and 4b at the shipping handler's market area prices. The receiving handler will be credited for Class 1 and charged for Class 2, 3, 4a, and 4b at the receiving handler's market area prices.

(b) The provisions of this section shall only apply to transfers made during the months of September through the following February.

Section 813.The following shall be shown for transfers for which a credit is requested under Section 812:

(a) The original classification and value assigned to market milk, market skim milk, and market cream transferred in bulk form and the reassigned classification of market milk and skim milk (excluding condensed skim milk and market cream);

(b) The computed value of the original and revised classifications at both the shipping and receiving handler market area prices;

(c) The net adjustment to the pool obligation of both the shipping and receiving handler.

Section 814. The secretary shall verify and correct, if necessary, the adjustments requested under this article and adjust the handler obligation accounts within 60 days after receiving the handler report. The handler adjustments shall be reflected in the fat and solids not fat prices by adjustment of the net pool balance utilized pursuant to Paragraph 902(c) or Section 906, whichever is applicable.

Article 9. Computation of Handler Obligation and Quota, Base, and Overbase Pool Prices

Section 900. The gross pool obligation of each handler for each of the plants or for a cooperative association acting as a handler under Paragraph 105(c) shall be computed as follows:

(a) Multiply the quantities for each class as determined under Sections 801, 802 and 803 for each plant by the appropriate price announced

for such class by the secretary, f.o.b. such handler's plant or the pool or nonpool plant to which diverted;

(b) Multiply the quantities for each class as determined under Sections 801, 802 and 803 for each cooperative association acting as a handler under Paragraph 105(c) by the appropriate price announced for such class by the secretary, f.o.b. the pool or nonpool plant where the milk was first received from producers;

(c) Deduct an amount computed by multiplying the pounds of solids not fat or the skim milk equivalent of condensed skim milk used in fortifying Class 1 products by the appropriate charge allowable for condensing or drying of market skim pursuant to the applicable Stabilization and Marketing Plan.

(d) Deduct from the amounts calculated above, a credit to the handler's obligation for milk received from other sources not included in receipts deducted in Section 802 which shall be determined as follows:

(1) The value based on the receiving plant's inplant usage as defined in Section 130 or the value based on the current month's quota fat price for the milk fat component and the current month's quota solids not fat price plus the pool price modification rate for the value of the solids not fat component, whichever is less.

(2) The value based on subparagraph (d)(1) of this Section or the value based on the current month's overbase fat price for the milk fat component and the current month's overbase solids not fat price plus the pool price

modification rate for the value of the solids not fat component, whichever is greater.

Section 901. The total pounds of milk in each class and the pool value thereof shall be computed by the secretary as follows:

(a) (1) Determine the net total pounds of Class 1 milk remaining under Paragraph 803(m) for all handlers and combine into one total sum the obligations of all handlers for such Class 1 milk;

(2) Subtract the net sum of all adjustments computed pursuant to Paragraphs 900(c) which represent modifications in the actual obligation of all handlers for Class 1 milk.

(b) Make similar determinations of the net total pounds and value of each of the other classes of utilization for all handlers;

(c) For those months in which the secretary has implemented the collection of security charges provided for in Chapter 2.5, Part 3, Division 21 of the Food and Agricultural Code, adjust the values of each class as determined under Paragraphs 901(a) and 901(b) by:

(1) Multiplying the total pounds in each class by the rate established in Section 62561 of the Food and Agricultural Code; and

(2) Deducting from the total value of each appropriate class, the amounts calculated under Subparagraph (1). The resulting value for each class shall be utilized in computing the prices under Sections 902, 903 and 904 or 906.

Section 901.5 For those months in which the secretary has implemented a temporary increase in the minimum prices of milk pursuant to Section 62062.2 of the Food and Agricultural Code, adjust the values of each class as determined under Paragraphs 901(a) and (b) by:

(a) Multiplying the total pounds in each class by the temporary price increase for such class as set forth in Section 300.0 of the Stabilization and Marketing Plans. The funds generated shall form a subpool to be distributed equally to all milk production in the pool;

(b) Deducting from the total value of each appropriate class, the amounts calculated under Paragraph (a), hereof. The resulting value for each class shall be utilized in computing the initial prices under Sections 902, 903 and 904.

Section 902. This section is not in effect as long as Section 62750 of the Food and Agricultural Code is in effect. No later than the 24th day of each month, the secretary shall compute and announce the quota price for the fat and solids not fat components of quota milk received from producers during the preceding month, in accordance with the following procedures:

(a) Compute the total value of the quota pool and the total value for other source milk by assigning thereto the value or a proportionate share of the total value of the milk fat and solids not fat usages necessary to reflect the total pounds of pool milk which qualified as quota fat and quota solids not fat for all producers, and the total pounds of fat and solids not fat other source milk, excluding the quota fat and quota solids not fat of producer-handlers which was assigned under Paragraph 803(a). The computation of Class 1 solids not fat shall include the value of

the fluid component which is contained in the Class 1 skim usage. The values shall be assigned in the following sequence: Class 1, Class 2, Class 3, and then the higher of Class 4a or Class 4b (based on hundredweight value computed at 3.5 percent butterfat and 8.7 percent solids not fat);

(b) Add an amount for each component to the value as necessary to reflect the total amount of regional quota adjusters computed pursuant to Article 9.1;

(c) Add not less than half of the amount on hand in the net pool balance for the respective component of milk;

(d) Subtract from each component the value a figure equal to not more than one percent of the resulting balance, plus or minus any amount necessary to eliminate any fractional amounts of less than one-tenth cent per pound in the price of quota fat and solids not fat;

(e) Divide the resulting sums by the pounds of the components of quota milk plus the pounds of the components of other source milk computed under Paragraph 902(a). The resulting figure shall be the quota pool price for such components.

Section 903. This section is not in effect as long as Section 62750 of the Food and Agricultural Code is in effect. No later than the 24th day of each month, the secretary shall compute and announce the base price for the fat and solids not fat components of base milk received from producers during the preceding month, in accordance with the following procedures:

(a) Combine the values computed pursuant to Paragraphs 902(a), and 904(a);

(b) Subtract the total amount obtained under Paragraph (a), hereof, and any security charges calculated under Paragraph 901(c) from the gross pool obligation of all handlers as computed under Section 900(a), (b) and (c);

(c) Divide the remaining value of the milk fat and solids not fat portions of pool milk by the pounds of milk fat and solids not fat, respectively, contained in base milk and round the resulting figure for milk fat and for solids not fat to the nearest one-tenth cent. The prices so computed shall be the base pool prices.

Section 904. This section is not in effect as long as Section 62750 of the Food and Agricultural Code is in effect. No later than the 24th day of each month, the secretary shall compute and announce the overbase price for the fat and solids not fat components of overbase milk received from producers during the preceding month, in accordance with the following procedures:

(a) Compute the total value of the overbase pool by assigning thereto the total value or a proportionate share of the total value of the fat and solids not fat components of Class 4a and Class 4b beginning with Class 4a or Class 4b milk, whichever has the lower hundredweight value computed at a 3.5 percent butterfat and 8.7 percent solids not fat basis, as necessary to reflect the total pounds of pool milk which qualified as overbase fat and solids not fat;

(b) Divide the values obtained pursuant to Paragraph (a) of this section by the pounds of fat and solids not fat, respectively, in overbase milk and round the resulting figure for milk fat and

for solids not fat to the nearest one-tenth cent. The prices so computed shall be the overbase pool prices.

Section 905. For those months in which the secretary has implemented a temporary increase in the minimum prices of milk pursuant to Section 62062.2 of the Food and Agricultural Code, distribute the subpool funds generated pursuant to Paragraph 901.5(a) by:

(a) Dividing the total value of the temporary price increase for each component of milk by the total pounds of that component which was produced and received from producers participating in the pool during the preceding month to determine the value per pound; and

(b) Adding this value per pound adjustment to the initial quota, base and overbase prices computed under Sections 902, 903 and 904. These prices so adjusted shall be the quota, base and overbase pool prices announced for that month by the secretary.

Section 906. This section applies as long as Section 62750 of the Food and Agricultural Code is in effect. No later than the 24th day of each month, the secretary shall compute and announce the prices for the fat and solids not fat components of quota and nonquota milk received from producers during the preceding month, in accordance with the following procedures:

(a) Compute the total value of pool milk by assigning thereto the total values of the milk fat and solids not fat usages, except the fat and solids not fat exemption of producer-handlers which was assigned under Paragraph 803(a). The total value of pool milk shall include the value of usage for other source milk. The computation of Class 1 solids not fat shall

include the value of the fluid component which is contained in the Class 1 skim usage;

(b) The total value of the quota premium pool shall be the sum of the following computations:

(1) Multiply the total solids not fat quota pounds by $0.195 and subtract the total amount of regional quota adjusters, computed pursuant to Article 9.1;

(2) Multiply the total solids not fat of other source milk by $0.195.

(c) Adjust the total fat value, calculated in Paragraph 906(a), by:

(1) Subtracting the fat value of the plant to plant transportation adjustments, calculated pursuant to Article 8.1;

(2) Adding not less than half of the amount on hand in the net pool balance for fat;

(3) Subtracting from the fat value a figure equal to not more than one percent of the resulting balance, plus or minus any amount necessary to eliminate any fractional amounts of less than one-tenth cent per pound.

(d) Divide the adjusted total fat value, as calculated in Paragraph 906(c), by the total quota and nonquota fat pounds plus the total fat pounds of other source milk to determine the quota and nonquota fat prices;

(e) Compute the adjusted solids not fat value from the solids not fat value, calculated in Paragraph 906(a) by:

(1) Subtracting the solids not fat value of the plant to plant transportation adjustments, calculated pursuant to Article 8.1;

(2) Subtracting the total transportation allowance, calculated pursuant to Article 9.2;

(3) Adding not less than half of the amount on hand in the net pool balance for solids not fat;

(4) Subtracting a figure equal to not more than one percent of the resulting balance, plus or minus any amount necessary to eliminate any fractional amounts of less than one-tenth cent per pound;

(5) Subtracting the quota premium pool value from the total solids not fat value, calculated pursuant to Paragraph 906(b).

(f) Divide the adjusted solids not fat value as calculated in Paragraph 906 (e), by the total quota and nonquota solids not fat pounds plus the total solids not fat pounds of other source milk, to determine the nonquota solids not fat price;

(g) Add $0.195 per pound to the solids not fat price calculated in Paragraph 906(f) to determine the quota solids not fat price.

Article 9.1. Regional Quota Adjuster

* * * * *

Section 920. Each producer shall be subject to the provisions of this article and shall, where applicable, participate in the transportation allowances set forth in Paragraph 921.2 and transportation sub-pools, when Section 925 is in effect.

* * * * *

Article 10. Reports and Payments to Producers and Equalization of Returns

* * * * *

Section 1001. Each handler other than those defined in Paragraphs 105(b) and (c) shall pay individual producers from whom milk is received directly at the pool plant or diverted by such handler to pool and nonpool plants at no less than the rates specified and no later than the dates indicated:

(a) On or before the 15th day of the month, each handler shall pay each producer the approximate net value for milk received or diverted during the last half of the preceding month based on the quota, base, and overbase prices announced for the month before the milk was received or diverted;

(b) On or before the last day of the month, each handler shall make final payment to each producer for the total value of milk received or diverted during the preceding month, excluding

pool milk received by nonpool plants as a direct purchase from individual producers, at not less than the rates specified below subject to adjustments, where applicable for transportation allowances and transportation charges specified in Article 9.2, and subject to deductions for advance payments made under this paragraph and Paragraph (a), hereof, for applicable charges for hauling the milk from ranch to plant and for assignments or other proper charges authorized in writing by the producer or required under Chapters 1, 2, and 3 of the Food and Agricultural Code, plus a payment for the approximate value of the milk based on the quota, base, and overbase prices for the preceding month for milk received or diverted during the first 15 days of the month:

(1) Quota milk delivered during the preceding month shall be paid for at the quota price announced by the secretary in accordance with Section 902, as adjusted for the regional quota adjuster pursuant to Article 9.1;

(2) Base milk delivered during the preceding month shall be paid for at the base price announced by the secretary in accordance with Section 903;

(3) Overbase milk delivered during the preceding month shall be paid for at the overbase price announced by the secretary in accordance with Section 904.

(c) Any handler qualified pursuant to Paragraph 105(a) who receives milk, skim milk, or cream at its pool plant(s) from handlers, as defined

pursuant to Paragraphs 105(b) and (c), shall pay such handlers no less than the applicable minimum class prices for such milk, skim milk, or cream no later than the dates specified:

(1) For milk received during the first 15 days of the month on or before the 28th day of such month based on the appropriate class prices, provided the class price announced for the preceding month shall be used for any class for which the current month's price has not yet been announced by the secretary;

(2) For milk received during the period from the 16th to the end of the month on or before the 13th day of the following month at no less than the appropriate class prices subject to any adjustment necessary due to overpayments or underpayments resulting from the use of tentative prices under Subparagraph (1), hereof.

(d) Each handler operating a nonpool plant as defined in Section 111 that receives market milk as a direct purchase from producers or from handlers defined pursuant to Paragraphs 105(b) and ©) shall pay for such milk at no less than the classified prices established by the Stabilization and Marketing Plans. The total combined inplant and derived usage of the nonpool plant shall be allocated among all producers each month.

* * * * *

Section 1003. Each handler shall make payment to the secretary on or before the second day after receiving notice of

any amount due pursuant to this section of the amount computed as follows:

(a) The secretary shall compute the total of the amounts due from such handler to individual producers at the rates specified in Subparagraphs 1001(b)(1), (2), and (3), as adjusted for regional quota adjusters and transportation allowances, pursuant to Articles 9.1 and 9.2, and transportation sub-pool charges, if in effect;

(b) Subtract the sum computed pursuant to Paragraph (a), hereof, from the gross pool obligation of such handler computed pursuant to Section 900, if such pool obligation is larger than the amount owed to producers. The resulting figure shall be known as the handler's net pool obligation;

(c) In the event any handler fails to pay to the secretary, the net financial obligation to the pool resulting from its operation on or before the 15th day of the second month following the month for which the obligation was incurred, the secretary may add to such unpaid balance interest at the rate of 1 percent (1%) per month computed from the first day of the second month following the month for which the obligation was incurred until such obligation is paid. Such obligation shall be reduced by the following:

(1) Payments received on or before the 15th of the month; and

(2) Any credits resulting from adjustments to previous obligations.

The interest charged under this section shall be added to the milk fat and solids not fat Producer Equalization Funds on a 1 to 2.5 ratio, respec-

tively. The handler shall not be entitled to pass such interest charge on to the producers.

(d) Except as provided in Paragraphs (e) and (f) of this section, the obligation of any handler to pay money required to be paid pursuant to this section shall terminate two years after the last day of the month during which the secretary receives the handler's report of receipts and utilization and disposition of which such obligation is based, unless within such two-year period the secretary notifies the handler in writing that such money is due and payable. Written notice shall be complete upon mailing to the handler's last known address the following information:

(1) The amount of the obligation;

(2) The month on which the obligation is based; and

(3) The account for which it is to be paid.

(e) If a handler fails or refuses to make available to the secretary all records required under this Plan, the secretary may notify the handler in writing as provided in Paragraph 1003(d), of such failure or refusal. If the secretary so notifies the handler, the two-year period in respect to such obligation shall not begin to run until the first day of the month following the month during which all records pertaining to the obligation were made available to the secretary;

(f) A handler's obligation under this Plan shall not be terminated for any transaction involving fraud or willful concealment of a fact on the part of the handler against whom the obligation is being imposed;

(g) Unless the handler gives notice within the applicable two-year period, the obligation of the secretary to pay a handler any money the handler claims to be due under the provisions of this Plan shall terminate two years after the end of the month during which the market milk involved in the claim was received.

Section 1004. If the gross pool obligation of the handler, as computed under Section 900, is less than the amount owed producers under Subparagraphs 1001(b)(1), (2) and (3) the secretary shall make payment of any difference to such handler from funds available in the Producer Equalization Funds on the 28th day after the end of the month or as soon thereafter as funds are available, provided that if adequate funds are not available in the appropriate fund on such date, a proportionate distribution of available funds shall be made to all handlers entitled to receive payments under this section.

ORDER GRANTING CERTIORARI

SUPREME COURT OF THE UNITED STATES

01-950

HILLSIDE DAIRY INC., A&A DAIRY, L&S DAIRY, AND MILKY WAY FARMS,
Petitioners,

v.

WILLIAM J. LYONS, JR., SECRETARY, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, ET AL.,
Respondents.

01-1018

PONDEROSA DAIRY, PAHRUMP DAIRY, ROCKVIEW DAIRIES, INC., AND D. KUIPER DAIRY,
Petitioners,

v.

WILLIAM J. LYONS, JR., SECRETARY, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, ET AL.,
Respondents.

January 10, 2003

Case below, 259 F.3d 1148

Petitions for writs of certiorari to the United States Court of Appeals for the Ninth Circuit granted. The cases are consolidated and a total of one hour is allotted for oral argument.

Supreme Court, U.S.
FILED
FEB 24 2003
OFFICE OF THE CLERK

Nos. 01-950, 01-1018

In the Supreme Court of the United States

HILLSIDE DAIRY, INC., A&A DAIRY, L&S DAIRY, and MILKY WAY FARMS,

Petitioners,

v.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, and ROBERT TAD BELL, Undersecretary, Department of Food & Agriculture, State of California,

Respondents.

PONDEROSA DAIRY, PAHRUMP DAIRY, ROCKVIEW DAIRIES, INC., and DARREL KUIPER and DIANE KUIPER, D/B/A D. KUIPER DAIRY,

Petitioners,

v.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, and ROBERT TAD BELL, Undersecretary, Department of Food & Agriculture, State of California,

Respondents.

On Writs Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR PETITIONERS

LAWRENCE S. ROBBINS
ROY T. ENGLERT, JR.
ROBBINS, RUSSELL, ENGLERT ORSECK & UNTEREINER LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

CHARLES M. ENGLISH, JR.*
WENDY M. YOVIENE
NICHOLAS C. GEALE
THELEN REID & PRIEST, LLP
701 Pennsylvania Ave., N.W.
Suite 800
Washington, D.C. 20004
(202) 508-4000

* *Counsel of Record, 01-950*

(Additional counsel listed on inside front cover)

JOHN H. VETNE
15 Powow St.
Amesbury, MA 01913
(978) 388-2480

RICHARD HESSE**
2 White Street
Concord, NH 03301
(603) 228-1541

** *Counsel of Record, 01-1018*

QUESTIONS PRESENTED

Petitioners accept the Solicitor General's formulation of the first question presented in his cert.-stage amicus brief:

1. Whether 7 U.S.C. § 7254 exempts California's pricing and pooling regulations from scrutiny under the Commerce Clause.

The second question presented (originally presented in the petition in No. 01-1018) is narrower than the second question presented in the Solicitor General's cert.-stage amicus brief and is as follows:

2. Whether substantive judicial review of discriminatory effect under the Privileges and Immunities Clause is foreclosed as a matter of law when state discrimination is facially based on the out-of-state location of a farm or business, but the challenged state statute does not expressly refer to out-of-state "residency" or "citizenship."

RULE 24.1(b) AND 29.6 STATEMENT

Petitioners in No. 01-950 are Hillside Dairy, Inc., A&A Dairy, L&S Dairy, and Milky Way Farms. Petitioners in No. 01-1018 are Ponderosa Dairy, Pahrump Dairy, Rockview Dairies, Inc., and Darrel and Diane Kuiper, d/b/a D. Kuiper Dairy. Respondents in both cases are William J. Lyons, Jr., Secretary of the California Department of Food and Agriculture, successor to Ann M. Veneman, Secretary of the California Department of Food and Agriculture at the time these lawsuits were filed; and Robert Tad Bell, Undersecretary of the California Department of Food and Agriculture, successor to A.J. Yates, Deputy Secretary of the California Department of Food and Agriculture at the time these lawsuits were filed. See 01-950 Pet. App. A14 nn.* & 1 (noting substitution of Lyons for Veneman); *id.* at A1 (listing Yates as a defendant-appellee); Sup. Ct. R. 35.3. Ms. Veneman is now the U.S. Secretary of Agriculture. Mr. Yates is now the Administrator of the Agricultural Marketing Service of the U.S. Department of Agriculture.

None of the corporate petitioners has issued stock or securities that are publicly traded, and none of the petitioners has a corporate parent, subsidiary, or affiliate that has issued publicly traded stock or securities.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15)[1] is reported at 259 F.3d 1148. The order denying rehearing and rehearing en banc (Pet. App. A59-A60) is unreported. The opinion and order of the district court granting summary judgment for respondents (Pet. App. A16-A22) is unreported.

JURISDICTION

The judgment of the court of appeals was entered August 9, 2001 (Pet. App. A1). Rehearing was denied September 24, 2001 (Pet. App. A59). The petitions for a writ of certiorari were filed December 26, 2001, and granted January 10, 2003. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Commerce Clause of Article I, Section 8, of the Constitution provides: "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

The Privileges and Immunities Clause of the Constitution, Art. IV, § 2, cl. 1, provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

Sections 143-145 of the Federal Agricultural Improvement and Reform Act of 1996 (1996 Farm Bill), Pub. L. No. 104-127, 110 Stat. 888, 915-918 (codified at 7 U.S.C. §§ 7253-7255), appear at JA 17-22 and at Pet. App. A65-A70.

California Food & Agric. Code § 35784 provides: "Market milk, at the time of delivery to the consumer, shall contain not

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[1] Citations to "Pet. App." are to the appendix to the petition in No. 01-950.

less than 3.5 percent of milk fat and not less than 8.7 percent solids not fat. The minimum percentages of milk fats and solids not fat required by this section may vary by an amount no greater than 0.1 of 1 percent, provided that the total combined percentages of milkfat and solids not fat, at the time of delivery to the consumer, shall equal or exceed 12.2 percent."

Excerpts of the California Department of Food and Agriculture's Pooling Plan for Market Milk, as amended, effective July 1, 1997, appear at JA 32-60.

STATEMENT

California engages in milk product *compositional* regulation as well as *economic* regulation of raw, unprocessed milk. So does the federal government.

California's product composition regulations include standards of identity for, among other things, milk that is packaged and consumed as a beverage. Those standards are contained in various sections of the Milk and Milk Products Act of 1947, Division 15 of the California Food and Agricultural Code. See Cal. Food & Agric. Code §§ 32501-39912. These standards of identity for fluid milk are sometimes referred to as "fluid milk standards" or "product composition regulations." The standard for packaged whole milk in Section 35784 includes higher requirements for "solids not fat" (*e.g.*, protein, lactose, and minerals) content of certain milk than the corresponding federal requirements. See also Cal. Food & Agric. Code § 38181, 38191, 38211. The California product composition requirements are administered by the Milk and Dairy Foods Control Branch of the California Department of Food and Agriculture (CDFA). See http://www.cdfa.ca.gov/ahfss/mdfc. Federal standards of identity and composition for milk and other food products are administered by the Food and Drug Administration (FDA). See 21 U.S.C. §§ 341, 371; 21 C.F.R. Parts 130-169; 21 C.F.R. § 131.110 (milk standards). Food product composition standards, also called "standards of

identity," are essentially standardized recipes to correspond with specific product names. See, *e.g.*, *62 Cases of Jam* v. *United States*, 340 U.S. 593 (1951); *Federal Security Administrator* v. *Quaker Oats Co.*, 318 U.S. 218 (1943).

California's economic regulation of milk includes milk pricing laws, milk pooling laws, and corresponding regulations. California's raw milk pricing laws are contained in the Milk Stabilization Act, Division 21, Part 3, Chapter 2, of the California Food and Agriculture Code. See Cal. Food & Agric. Code §§ 61801-62403; JA 23-25. California's milk pooling laws are contained in the Gonsalves Milk Pooling Act, Division 21, Part 3, Chapters 3 and 3.5, of the California Food and Agriculture Code. See Cal. Food & Agric. Code §§ 62700-62756; JA 25-31. The Dairy Marketing Branch of CDFA administers two Stabilization Plans under the Milk Stabilization Act. See http://www.cdfa.ca.gov/dairy/stabplans/ncastabplan.PDF; http://www.cdfa.ca.gov/dairy/stabplans/scastabplan.PDF. The Milk Pooling Branch of CDFA administers the Pooling Plan under the Milk Pooling Act. See JA 32-60 (1997 version of Pooling Plan); http://www.cdfa.ca.gov/mkt/mp/POOLPLAN_09-01.pdf (current version).

These two statutes and the corresponding plans are often referred to together as California's system of milk "pricing and pooling regulations." The U.S. Department of Agriculture (USDA) administers the corresponding federal plans – known as "Federal Milk Marketing Orders" (FMMO). See 7 C.F.R. §§ 1000-1135; see also 7 U.S.C. § 608c; *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 341-343 (1984).

This case concerns a statute – Section 144 of the 1996 Farm Bill, 7 U.S.C. § 7254 (JA 20-21) – that negates federal preemption of certain aspects of California's *compositional*

regulation of beverage milk.[2] No one disputes that a purpose – if not *the* purpose – of the statute was to protect California's higher fluid milk standards from preemption under the Nutrition Labeling and Education Act of 1990 (NLEA), 21 U.S.C. § 343-1(a), a statute administered by the FDA. According to the Ninth Circuit, the statute also constitutes unmistakably clear congressional permission for California to engage in *economic* regulation through its milk pricing and pooling plans without regard to whether any aspect of those plans would otherwise violate the Commerce Clause. Petitioners contend, by contrast, that Section 144 does not broadly exempt California's pricing and pooling plans from *any* body of federal law, and does not exempt *any* body of California law from scrutiny under the Commerce Clause. Accord U.S. Br. 8-9 (filed Dec. 4, 2002).

The individual petitioners also contend that the 1997 amendments to California's Pooling Plan discriminate against them on the basis of out-of-state residency, in violation of the Privileges and Immunities Clause. The merits of the Privileges and Immunities Clause claim, like the merits of the Commerce

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[2] Section 144 provides in full:

> **§ 7254. Effect on fluid milk standards in State of California**
>
> Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding —
>
> (1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or
>
> (2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

Clause challenge to the 1997 amendments by all petitioners, are not before this Court. The Ninth Circuit did not decide whether there is "substantial reason for the discrimination beyond the fact that they are citizens of other States," *Toomer* v. *Witsell*, 334 U.S. 385, 396 (1948), because it denied that any discrimination on the basis of citizenship had occurred. To reach that conclusion, the Ninth Circuit examined only the face of the 1997 amendments, which in explicit terms discriminate on the basis of where milk is produced rather than on the basis of the citizenship of those producing it. Despite *Chalker* v. *Birmingham & N.W. Ry.*, 249 U.S. 522 (1919), which condemns "laws which *in their practical operation* materially abridge or impair the equality of commercial privileges secured by the federal Constitution to citizens of the United States" (*id.* at 526-527 (emphasis added)), the Ninth Circuit refused to consider the individual petitioners' factual contention that milk production is so closely tied to residency that discrimination on the basis of the location of the dairy farm is in practical operation discrimination on the basis of the citizenship of the dairy farmer.[3]

Petitioners contend that the Ninth Circuit erred both in construing 7 U.S.C. § 7254 to foreclose any challenge under the Commerce Clause, and in construing the Privileges and Immunities Clause to disallow claims in the absence of *facial* citizenship discrimination without regard to the practical effect of a state law or regulation. Petitioners do not ask the Court to resolve the complex merits of their constitutional challenges to the 1997 amendments to California's Pooling Plan, merits

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[3] This factual contention was not developed below, as the Privileges and Immunities Clause claims were dismissed under Fed. R. Civ. P. 12(b)(6). See C.A. Excerpts of Record Tab 8. However, as petitioners pointed out in briefs to the courts below, the most recent Census of Agriculture reveals that 93% of reporting dairy farm operators reside on the farm they operate. USDA, 1997 CENSUS OF AGRICULTURE Table 51, http://www.nass.usda.gov/census.

issues that have never been fully developed below because of the lower courts' dismissal of petitioners' claims on threshold grounds. Rather, "if the Court were to * * * reverse on the Section 7254 question" and the question whether the Privileges and Immunity Clause applies at all, "it would be appropriate to remand the underlying Commerce Clause" and Privileges and Immunities Clause "question[s] for consideration by the lower courts in the first instance." U.S. Br. 17 (filed Dec. 4, 2002).

A. California's Milk Product Composition Regulation and Stabilization and Pooling Plans

Single-state economic regulation of milk has been difficult ever since this Court construed the Commerce Clause in *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), to forbid the States from setting minimum prices for milk purchased in interstate commerce. However, Congress authorized the U.S. Secretary of Agriculture to establish and maintain "orderly marketing conditions for agricultural commodities in interstate commerce." 7 U.S.C. § 602(1); see *Block* v. *Community Nutrition Inst.*, 467 U.S. at 346 ("The Act contemplates a cooperative venture among the Secretary, handlers, and producers the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them.").

Today, almost all of the 48 contiguous States are covered by the Federal Milk Marketing Order (FMMO) program. The major exception is California. Among other things, the federal program contains its own pricing and pooling mechanisms. See generally *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 189 n.1 (1994); *Block* v. *Community Nutrition Inst.*, 467 U.S. at 343.

California has been regulating fluid milk standards for beverage milk sold at retail since at least 1907. See *Ex parte Hoffman*, 155 Cal. 114, 116-117, 99 P. 517, 518 (1909). During the 1990s, certain California composition and labeling standards for packaged fluid milk were preempted by those administered by the FDA under the NLEA, 21 U.S.C. § 343-

1(a). See *Shamrock Farms Co.* v. *Veneman*, No. CIV-S-95-318, slip op. 3 (E.D. Cal. June 5, 1995) (Levi, J.). Section 144 of the 1996 Farm Bill – whatever other effects may be in dispute – gave California an exemption from the preemptive effect of the NLEA with regard to fluid milk fortification. Thus, California requires fluid milk processors to fortify beverage milk that is sold at retail with minimum levels of solids not fat (using non-fat dry milk or condensed milk) that exceed federal composition and labeling standards under the NLEA. Cal. Food & Agric. Code § 35784.

California, like USDA, also engages in economic regulation of raw milk. Since the 1930s, California has regulated processors (those who convert raw milk to finished dairy products such as beverage milk, sour cream, ice cream, cheese, and butter) by requiring that California processors pay dairy farmers minimum prices when purchasing raw milk. See, *e.g.*, Stabilization and Marketing Plan for Market Milk, As Amended, for the Northern California Marketing Area <http://www.cdfa.ca.gov/dairy/stabplans/ncastabplan.PDF>. Raw milk is classified according to the end product for which it is used. California's five Classes (1-3, 4a, and 4b) include Class 1, fluid/beverage milk, and Classes 4a and 4b, nonfat dry milk, butter, and hard cheese. See Calif. Food & Agric. Code §§ 61932-61935. A processor purchasing raw milk for conversion to fluid milk must pay the Class 1 price; a processor purchasing raw milk for conversion to hard cheese must pay the Class 4b price. Generally, the highest minimum prices apply to Class 1 milk and the lowest to Class 4a or 4b milk.

As in the federal program (see *West Lynn*, 512 U.S. at 189 n.1), California has since 1969 administered a revenue equalization pool to redistribute among dairy farmers revenue from the sale of milk at various classified prices. See JA 32-60 (1997 version of Pooling Plan); http://www.cdfa.ca.gov/mkt/mp/POOLPLAN_09-01.pdf (current version). Minimum price regulation – described above and carried out through the Stabil-

ization Plans – results in different prices for the same raw milk depending on whether it is used by the processor for Class 1, 2, 3, 4a, or 4b purposes.

To limit competition for and transaction costs associated with sales to the highest paying (generally Class 1) processors, California dairy farmers agreed (by rule and referendum) to pool their revenue and divide it up on a uniform or pro rata basis. The distribution is called the "blend price." There are two farm blend prices in California (called "quota" and "overbase") instead of a single blend price, as in the federal system. See CDFA, Marketing Services Division, Dairy Marketing Branch, *Glossary of Dairy Marketing Terms* <http://www.cdfa.ca.gov/dairy/appendix.html>.

The mechanics of enforcing this basic pair of concepts – that processors pay the nonuniform prices depending on the Class or Classes of products they produce, but farmers receive the blend price – are somewhat intricate. In California, CDFA is the administrator of the revenue pool. Processors are simply required to serve as "conduits" of the redistributed revenue. In this capacity a Class 1 processor pays the applicable quota or overbase blend price to the dairy farmer. The amount paid directly to farmers is "credited" against the processor's total minimum Class 1 price obligation. This total is also called the "gross pool obligation." The processor pays the remainder of the minimum Class 1 price into the Pool. The Class 1 processor, by two checks, has therefore simply accounted for the full minimum price. A Class 4a or 4b processor similarly pays the blend price to the dairy farmer. Because the blend price is generally greater than the processor's Class 4 price obligation, the processor receives from the Pool reimbursement for the difference between the blend price and the (lower) minimum Class 4a or 4b price. The Class 4 processor has therefore also simply accounted for the minimum Class 4 milk price – its gross pool obligation – while farmers have received their pooled, blend price.

In practice, most processors do not exclusively produce one Class of products and must pay the gross pool obligation based on a weighted average of the various Class prices. The weighted average applied to a hundredweight sales unit of milk (*i.e.*, 100 pounds of milk) is referred to as the "plant blend price." For example, the plant blend price for a plant processing 50% Class 1 milk at $18 per hundredweight and 50% Class 2 at $15 would be $16.50. The "plant blend price," fundamentally a processor concept that results from pricing regulation, is not to be confused with the "blend price," fundamentally a producer (dairy farmer) concept that results from pooling regulation.

Before the 1997 Pooling Plan amendments, out-of-state dairy farmers (including petitioners) were the masters of their own economic destiny. Unlike their California counterparts, who through pooling were guaranteed the blend price and eligible to own "quota" without having to compete for the best purchasers, Arizona and Nevada farmers had both the opportunity and the burden to compete for the California business worth competing for, mainly the Class 1 sales. California did not pool and redistribute the difference between the sale price (plant blend price paid) and the blend price. Rather, California processors and out-of-state farmers engaged in something more closely resembling a free-market transaction, with the total price going entirely to the seller – the out-of-state farmer. See U.S. Br. 5-6 (filed Dec. 4, 2002) ("although a handler that principally produced fluid milk had to pay money into the pool for its raw milk purchases from California dairy farms, it did not have to pay money into the pool for its purchases from out-of-state farmers").

California farmers were protected by the Pool system from having to compete for sales generating the highest minimum price, while out-of-state farmers had no such protection from competition, nor did they receive the benefits of being able to own and transfer quota. As the CDFA Milk Pooling Branch Chief explained in testimony before Congress in 1995:

> Out-of-state dairy farmers may not own quota. *In compensation*, out-of-state dairy farmers shipping to an instate plant receive the plant blend price. Thus, it is possible for an out-of-state dairy farmer shipping to an instate fluid milk plant (Class 1 plant) to receive a higher price than an instate dairy farmer receiving the quota price.

Formulation of the 1995 Farm Bill (Dairy Title—Technical Considerations): Hearings Before the Subcomm. on Livestock, Dairy, and Poultry of the House Comm. on Agriculture, 104th Cong., 1st Sess. 347 n.13 (1995) (prepared statement of Glenn T. Gleason, Chief, Milk Pooling Branch, CDFA) (emphasis added); see also Pooling Plan § 104, JA 32; U.S. Br. 4 n.1 (filed Dec. 4, 2002).

After 30 years of staying out of the transactions between out-of-state dairy farmers and California processors, CDFA's economic regulatory arm in July 1997 implemented amendments to the California Pooling Plan that forced out-of-state dairy farmers to participate in the California Pool, but only as second-class citizens. As the Solicitor General has observed, "out-of-state dairy farmers, unlike California dairy farmers, are not guaranteed any minimum price for their raw milk (much less the quota price)." U.S. Br. 6 (filed Dec. 4, 2002); see also *id.* at 17. CDFA adopted the challenged amendments after repeated requests by California dairy farmer groups to address what was widely referred to as the "out-of-state milk problem." See C.A. E.R. Tab 11K at 2. Petitioners' challenges to the 1997 amendments are the subject of these lawsuits.

B. This Case

Petitioners are corporations and individuals who operate dairy farms in Nevada and Arizona. In two separate actions that are now consolidated, they challenged the constitutionality of the 1997 amendments to the California Pooling Plan. They contended that the Pooling Plan, and underlying provisions of the Milk Stabilization and Milk Pooling Acts, directly burden

and discriminate against out-of-state dairy farmers in violation of the Commerce Clause and the Privileges and Immunities Clause.

Without reaching the constitutional merits, the district court rejected those claims. In granting summary judgment for the State on the Commerce Clause claims, the court relied on *Shamrock Farms Co.* v. *Veneman*, 146 F.3d 1177 (9th Cir. 1998), cert. denied, 525 U.S. 1105 (1999), which the court understood as holding that 7 U.S.C. § 7254 "immunized California's milk pricing and pooling laws from Commerce Clause challenge." Pet. App. A19. The court dismissed the claim under the Privileges and Immunities Clause on the ground that "the pooling plan does not discriminate against nonresidents." Pet. App. A5; C.A. E.R. Tab 8 at 5.

The Ninth Circuit affirmed. Pet. App. A1-A15. The Ninth Circuit agreed with the district court that *Shamrock* controlled the Commerce Clause claim. Although *Shamrock* had addressed California's milk composition requirements for fluid milk and its fortification allowance for in-state handlers, not every pricing and pooling requirement for raw milk, the Ninth Circuit held that "*Shamrock* broadly refers to the pricing and pooling laws and finds them to be closely related to California's composition requirements and protected from Commerce Clause challenges." Pet. App. A7-A8. Relying (*id.* at A8) on legislative history cited in *Shamrock*, without any analysis of whether that legislative history had anything to do with economic regulation of raw milk, the court concluded that California's raw milk and fluid milk regulations are "closely related" and that it "follows that the 1997 amendments which directly affect raw milk, indirectly affect fluid milk." Pet. App. A10. The Ninth Circuit believed that that conclusion somehow meant that application of the Commerce Clause to California's raw milk Stabilization and Pooling Plans would somehow "preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or

continue to effect any law, regulation, or requirement regarding (1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or (2) the labeling of such fluid milk products with regard to milk solids or solids not fat." 7 U.S.C. § 7254.

The Ninth Circuit also affirmed the dismissal of the claims under the Privileges and Immunities Clause. The court dismissed the individual dairy owner petitioners' claims because "[t]he amendments do not, *on their face*, create classifications based on any individual's residency or citizenship." Pet. App. A14 (emphasis added). Analyzing only the face of the Pooling Plan, not its practical effect, the court observed that "the classifications the pooling plan amendments create are based on the location where milk is produced," not on "any individual's residency or citizenship." *Ibid.*[4]

SUMMARY OF ARGUMENT

Only an unmistakably clear statute will suffice to exempt state regulations from Commerce Clause scrutiny. The text of the statute is by far the best evidence of whether Congress has spoken with clarity. Ambiguous statements will not suffice.

Section 144 of the 1996 Farm Bill does not broadly protect California's economic regulation of raw milk from federal law, nor is the Commerce Clause part of the federal law from which Section 144 provides protection. The statute does *not*, as the Ninth Circuit claimed (Pet. App. A10), "appl[y] to 'any provision of law' that 'directly or indirectly' has an effect on fluid milk." It gives California permission, free from certain constraints of federal law, to use direct or indirect means to "estab-

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[4] The court also held that the corporate petitioners could not raise a Privileges and Immunities Clause claim. Pet. App. A13. Petitioners did not advance corporate claims in the court of appeals and do not challenge that aspect of the decision. See *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168, 178-179 (1869).

lish or continue to effect" requirements regarding two specified subjects that are a small subset of the subjects that have to do with packaged fluid milk. It is not even remotely plausible to say that the *entire* range of things covered by California's pricing and pooling plans has anything to do with percentage and labeling of milk solids and solids not fat, let alone that every provision is necessary "to establish or continue to effect" fluid milk composition and labeling requirements. Indeed, Congress in this very same legislation demonstrated that it knows how to use the vocabulary of California pricing and pooling regulation and would not likely refer to that body of regulation through the language it used in Section 144.

Furthermore, Congress made no reference to the Commerce Clause. The "provision[s] of law" courts are not to "construe[]" to invalidate California's fluid milk composition standards are statutory. Both the use of the verb "construe" and the pairing of "this Act" with "any other provision of law" suggest that the *most* natural reading of the text is that it does not refer to the Constitution; the applicable clear-statement rule precludes construing ambiguous text as a Commerce Clause exemption.

Legislative history *cannot* supply the necessary clear statement. Even if it could, however, the legislative history of Section 144 would help respondents not one bit. From its origin as one item on the wish list of Congressman Bill Thomas, through the Conference Report and even subsequent floor statements, Section 144 was *never* described as having anything to do with the Commerce Clause and *always* described as a provision that would preclude the NLEA from preempting California's historical composition standards for fluid milk.

The Commerce Clause challenge itself is not before the Court but is a very serious one. Both the California Legislative Counsel and the U.S. Solicitor General have observed its seriousness. The 1997 amendments project California's legislation into surrounding States and do so to suppress or mitigate the consequences of competition between States.

The Ninth Circuit also erred at the threshold of analysis of Privileges and Immunities Clause jurisprudence by holding that the individual petitioners' claims must fail because the discrimination effected by the milk pooling scheme is based on the location of the farm where the milk is produced, and not the residency or citizenship of the producer. In the relevant areas of its jurisprudence, this Court has emphasized substance, not form. In particular, *Chalker* v. *Birmingham & N.W. Ry.*, 249 U.S. 522 (1919), and *United Building & Construction Trades Council* v. *Mayor and Council*, 465 U.S. 208 (1984), construe the Privileges and Immunities Clause in ways that directly foreclose the Ninth Circuit's analysis.

ARGUMENT

I. SECTION 144 OF THE 1996 FARM BILL DOES NOT EXEMPT CALIFORNIA'S STABILIZATION AND POOLING PLANS FROM SCRUTINY UNDER THE COMMERCE CLAUSE

A. Only an Unmistakably Clear Statute Will Suffice to Exempt State Statutes or Regulations from Commerce Clause Scrutiny

"Congress, if it chooses, may * * * confer[] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980). "[F]or a state regulation to be removed from the reach of the dormant Commerce Clause," however, "congressional intent must be *unmistakably clear*." *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 91 (1984) (emphasis added); see also *Wyoming* v. *Oklahoma*, 502 U.S. 437, 458 (1992); *Maine* v. *Taylor*, 477 U.S. 131,139 (1986); *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 408 (1994) (O'Connor, J., concurring in the judgment). The Ninth Circuit itself has paid lip service to the need for "unmistakably clear" congressional intent. Judge Reinhardt's opinion for the Ninth Circuit in *Shamrock*, for example,

acknowledged that only an unmistakably clear congressional intent would suffice. 146 F.3d at 1180. In determining that Congress had indeed spoken with unmistakable clarity, however, not only did the Ninth Circuit err; the Ninth Circuit completely failed to analyze the clarity of the materials on which it relied to demonstrate a supposed congressional intent.

"The requirement that Congress affirmatively contemplate otherwise invalid state regulation is mandated by the policies underlying dormant Commerce Clause doctrine." *South-Central Timber*, 467 U.S. at 91-92. The rationale for the clear-statement rule in this area of the law is that, "when Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others." *Id.* at 92. From that rationale, it necessarily follows that the text of the statute is the best evidence of whether congressional intent has been manifested with sufficient clarity; and that, if legislative history is to be examined at all, it must manifest a congressional decision that is both *collective* and *clear*. Statements of witnesses at a subcommittee hearing – on which the Ninth Circuit relied in both *Shamrock*, 146 F.3d at 1182, and the decision below, Pet. App. A8 – are particularly poor candidates to manifest clear, collective intent.

In numerous cases in various areas of the law, this Court has emphasized the stringency with which it will apply clear-statement rules. "In traditionally sensitive areas, * * * the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991) (internal quotation marks and citations omitted). Therefore "it must be *plain to anyone reading the Act* that it covers" the subject at issue in the litigation. *Id.* at 467 (emphasis added). It is not enough that it "could be broadly read." *Raygor* v. *Regents of University of Minnesota*, 534 U.S. 533, 542 (2002); see also *id.* at 544-545. "Evidence of

congressional intent must be both unequivocal and textual." *Dellmuth* v. *Muth*, 491 U.S. 223, 230 (1989).

Specific words may not be required, but an absence of ambiguity is. Affirmative statements, not inference, must be found. *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982). "[W]hen Congress has not 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause, [courts] have no authority to rewrite the legislation based on mere speculation as to what Congress 'probably had in mind.'" *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982) (citation omitted).

Section 144 of the 1996 Farm Bill protects some body of California law against some body of federal law. In light of the applicable clear-statement rule, the statute must be examined both to ascertain whether the Stabilization and Pooling Plans are clearly part of the California law to be protected, and whether the Commerce Clause is clearly part of the federal body of law from which Section 144 protects. Neither proposition is true. As the Solicitor General correctly observed in his cert.-stage amicus brief, "Section 7254 does not contain any indication at all, much less an 'unmistakably clear' one, that Congress intended to immunize California's milk pricing and pooling laws from Commerce Clause scrutiny." U.S. Br. 10 (filed Dec. 4, 2002).

B. Section 144 of the 1996 Farm Bill Contains No Unmistakably Clear Indication – Indeed, No Indication at All – That Congress Intended to Immunize California's Pricing and Pooling Laws from Commerce Clause Scrutiny

1. The text of Section 144 refers to neither pricing and pooling laws nor the Commerce Clause

Section 144 of the 1996 Farm Bill, 7 U.S.C. § 7254, provides in full:

§ 7254. Effect on fluid milk standards in State of California

Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding —

(1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or

(2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

The statute is obviously designed to provide some degree of protection from federal law for California's product composition and labeling requirements for packaged fluid milk. Petitioners respectfully submit, however, that it does not broadly protect California's economic regulation of raw milk from federal law, nor is the Commerce Clause part of the federal law from which Section 144 provides protection.

a. Section 144 does not broadly protect California's economic regulation of raw milk from federal law

In *Shamrock*, and again in the decision below, the Ninth Circuit interpreted the phrase "any other provision of law," from which specified California regulations are protected, to include the Commerce Clause. Even if that interpretation was right – and it was not right (see pp. 23-25, *infra*) – several further interpretive violations of the "clear statement" rule are required to conclude that Congress immunized *all* things California does with its pricing and pooling plans to impede interstate commerce. And those leaps are not sustainable as a matter of ordinary statutory interpretation, let alone under the clear-statement principle applicable to statutes said to abrogate the Commerce

Clause. See U.S. Br. 11 (filed Dec. 4, 2002) ("Section 7254, even if understood to provide a Commerce Clause immunity for some state laws, does not reach the laws at issue here.").

The Ninth Circuit at least understood that the Pooling Plan concerns *raw* milk, whereas the statute refers to regulation of *fluid* milk sold at retail. To bridge the gap between the statute's references to regulation of fluid milk sold at retail and its holding that regulation of raw milk is also protected, the Ninth Circuit engaged in a wholesale rewriting of the statutory text. In the court's view:

> Ponderosa and Hillside's argument is unpersuasive because § 144 applies to "any provision of law" that "directly or indirectly" *has an effect on fluid milk.* Raw milk and fluid milk are closely related. *It follows that the 1997 amendments which directly* ***affect*** *raw milk, indirectly* ***affect*** *fluid milk.*

Pet. App. A10 (emphasis added). But Section 144 simply does not apply to any provision of law that directly or indirectly has an effect on fluid milk. In statutory context, "directly or indirectly" modifies "establish or continue to effect." Thus, whatever the statute gives California permission to do, California may do "directly or indirectly." That is hardly the same thing as saying that California has been given permission to do anything and everything that directly or indirectly has any effect on fluid milk. Rather, California has been given permission, free from certain constraints of federal law, to "establish or continue to effect" requirements "*regarding*" two specified subjects that are a small subset of the subjects that have to do with fluid milk.

Suppose California had been given permission, "directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding soccer or football." Soccer and football are part of the universe of sports, just as the composition and labeling subjects identified in Section 144 are part of the universe of fluid milk regulation. The Ninth Circuit's logic

would require that the statute, ostensibly just about football and soccer, be construed as permission to engage in the regulation of all sports and indeed all exercise:

> Ponderosa's and Hillside's argument is unpersuasive because [the hypothesized statute] applies to "any provision of law" that "directly or indirectly" has an effect on [sports]. [Exercise] and [sports] are closely related. It follows that the 1997 amendments which directly affect [exercise], indirectly affect [sports].

The specification of two subjects that the protected requirements must "regard[]" would be rendered meaningless by this substitution of the general universe to which those two subjects belong (sports) for the two specified subjects themselves.

Not only did the Ninth Circuit read "directly or indirectly" to modify a phrase it does not modify, and substitute the broad universe of "fluid milk" for the two specified subjects within that universe, but also the Ninth Circuit introduced a concept – "has an effect on fluid milk" – that is to be found nowhere in the statute. Suppose – contrary to fact – that the statute did say "fluid milk" instead of specifying two *aspects* of fluid milk regulation that Congress wished to protect. Even so, it would read: "Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding fluid milk." Such a statute still would require that the protected "law, regulation, or requirement" be one "*regarding*" fluid milk. California would be given some leeway to "establish or continue to effect" such requirements by indirect means as well as direct ones, but a "law, regulation, or requirement regarding fluid milk" – not a law, regulation, or requirement that "has an effect on fluid milk" – would still have to be identified. Because the verb "effect" appears in the statute, the Ninth Circuit seems to have leaped to the conclusion that it was proper to rewrite the statute as if it used the noun "effect" in a different place in the

statute, or used the verb "affect" in a different place in the statute, but the concepts of "affecting" and "having an effect on" are wholly absent from the statute Congress actually wrote. Particularly in a context in which a "clear statement" principle applies, such loose construction of statutory text is indefensible.

The universe of state laws and regulations that were given some form of protection from federal preemption is specified in the statute. That universe consists of requirements "regarding (1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or (2) the labeling of such fluid milk products with regard to milk solids or solids not fat." On the statute's face, the protected requirements have to do with composition and labeling of fluid (*i.e.*, processed) milk, specifically with respect to the percentage of milk solids or solids not fat. It is a leap to get from those statutory terms to *any* of California's economic regulations, let alone California's dairy farmer pooling provisions for raw (*i.e.*, unprocessed) milk. See U.S. Br. 11 n.2 (filed Dec. 4, 2002).

One particular form of economic regulation that is part of California's stabilization plans is a so-called "fortification allowance" (*i.e.*, discounted minimum price) given to California processors in recognition of the fact that California requires higher fat and solids-not-fat content in fluid milk than does the federal government and that money must be spent to bring raw milk up to California standards. *E.g.*, Stabilization and Marketing Plan for Market Milk, As Amended, for the Northern California Marketing Area, § 303(B)-(E) <http://www.cdfa.ca.gov/dairy/stabplans/ncastabplan.PDF>. There is enough of a relationship between the fortification allowance, on the one hand, and the types of product composition and labeling requirements identified in Section 144, on the other, to create some arguable (though very thin) support for the Ninth Circuit's determination in *Shamrock* that the fortification allowance was necessary for California's fluid milk standards or labeling requirements. See 146 F.3d at 1182 (relying on counsel's sup-

posed concession during oral argument that the fortification allowance was "adopted in order to assist milk producers [*sic*] in complying with the milk content provisions"). That holding may well be wrong, but is not before the Court in this case.[5]

The further leap that must be made to bring the entirety of California's pricing and pooling plans within the universe of state laws protected by Section 144, however, is utterly indefensible. Section 144 is exclusively about the percentage of, and labeling with respect to, milk solids and solids not fat, *not* pricing and pooling. It is designed to protect Cal. Food & Agric. Code § 35784 and related regulatory requirements administered by the Milk and Dairy Foods Control Branch of CDFA, not to protect the unmentioned Stabilization and Pooling Plans administered by other branches of CDFA. Nor is it even remotely plausible to say that the *entire* range of things covered by the pricing and pooling plans has anything to do with percentage and labeling of milk solids and solids not fat, let alone that every provision is necessary "to establish or continue to effect" fluid milk composition and labeling requirements – which is, after all, the statutory text that must make it "plain to anyone reading the Act" (*Gregory*, 501 U.S. at 467) that the pricing and pooling laws are exempted from the Commerce Clause.

Believing that it had already determined in *Shamrock* that *all* California pricing and pooling requirements are immunized from the Commerce Clause, the Ninth Circuit did not engage in

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[5] *Shamrock* was certainly wrongly decided, in any event, because the federal laws against which Section 144 protects do not include the Commerce Clause (see pp. 23-25, *infra*); and Shamrock's complaint in this regard was "that California processors receive a competitive advantage against out-of-state processors because California only gives the fortification allowance to in-state processors." 146 F.3d at 1179. Furthermore, California's fluid standards have been in effect since at least 1907, see *Ex parte Hoffman*, 155 Cal. at 116-117, 99 P. at 518, but pooling was not adopted until 1969 – proving that pooling is unnecessary to maintain fluid milk standards.

any analysis – other than the hopelessly confused passage quoted above – of the relationship between the economic regulations at issue in this case and the product composition and labeling subjects mentioned in Section 144. And it is revealing what respondents had to say on that subject in their brief in opposition to the certiorari petitions. Only on page 15 did respondents address that relationship (the brief in opposition is otherwise largely devoted to the Commerce Clause merits, which are not before the Court). All they could say was "[e]ach of the challenged provisions is interrelated to California's fluid milk standards" without saying *why* or *how* the economic regulations petitioners challenge are necessary "to establish or continue to effect" the product composition and labeling requirements for which Congress created some degree of protection. It is a truism that "really, universally, relations stop nowhere" (*New York State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins Co.*, 514 U.S. 645, 655 (1995)), so that one can with a straight face claim that almost anything is "interrelated" to almost anything, but the statute actually before the Court requires far more than interrelatedness. See also U.S. Br. 12 (filed Dec. 4, 2002). It requires that the challenged state regulation be related to the specified fluid milk standards in such a way that striking down the former under federal law would – so obviously as to satisfy the applicable clear-statement rule – prevent California from "establish[ing] or continu[ing] to effect" the latter. 7 U.S.C. § 7254. No one has come up with any plausible theory – let alone a clear statement – that even purports to explain why striking down California's 1997 pooling amendments might jeopardize its product composition standards for fluid milk.

Congress in this very same legislation demonstrated that it knows how to use the vocabulary of California pricing and pooling regulation and would not likely refer to that body of regulation through the language it used in Section 144. See U.S. Br. 11-12 (filed Dec. 4, 2002). In the immediately preceding Section 143, 7 U.S.C. § 7253 (JA 17-20), for example,

not only did Congress provide for California's voluntary entry into the FMMO system, but also it provided that "[t]he order covering California shall have the right to * * * recognize quota value." 7 U.S.C. § 7253(a)(2) (JA 17). The reference to "quota" in Section 143 is to a term that is unique to California's Pooling Act and Pooling Plan.[6] Likewise, Section 145, 7 U.S.C. § 7255 (JA 21-22) is devoted in its entirety to restrictions on allowable "manufacturing allowances" under state law. As CDFA's Glossary (see note 6, *supra*) indicates, this term is "also called make allowance" and is "[u]sed to describe factors used in establishing California Class 4a and 4b prices and federal Class III and IV prices." It is an important component of California's Stabilization (pricing) Plans. *E.g.*, Stabilization and Marketing Plan for Market Milk, As Amended, for the Northern California Marketing Area, § 300.0(D)(1), (D)(2), (E)(1)(a), (E)(1)(b) <http://www.cdfa.ca.gov/dairy/stabplans/ncastabplan.PDF>. Congress used precise terminology when it wanted to refer to aspects of the Stabilization and Pooling Plans; it did not speak of them through indirect and obscure references to California's product composition regulations.

b. Section 144 does not protect any body of California law from the Commerce Clause

Misconstruing the body of *state* law saved from federal preemption by Section 144 was not the Ninth Circuit's only error. The Ninth Circuit also misconstrued – in both the deci-

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[6] See generally CDFA, Marketing Services Division, Dairy Marketing Branch, *Glossary of Dairy Marketing Terms* <http://www.cdfa.ca.gov/dairy/appendix.html>. The glossary notes that "quota" is a California-specific term and defines it as follows: "Part of a two–tiered pricing system in California. Essentially, quota is an entitlement that allows a producer to receive a price for milk that is $1.70 per hundredweight higher than the overbase price. Originated with the inception of the milk pooling program in 1969."

sion below and *Shamrock* – the body of *federal* law *from* which the specified body of California law is exempted.

As the Solicitor General observed in his cert.-stage amicus brief (at 10-11 (emphasis in original)):

> The statutory text does not unambiguously indicate that Congress intended to exempt *any* of California's laws from the Commerce Clause. Section 7254 does not refer to the Commerce Clause specifically or to the Constitution more generally. Moreover, its directive that no provision of law "shall be construed" in a particular manner is more naturally read as referring only to non-constitutional sources of law, because Congress is not ordinarily assumed to have intended to constrain the Judiciary's authority to construe the Constitution. Cf. *City of Boerne* v. *Flores*, 521 U.S. 507, 535-536 (1997). * * * Section 7254 thus is best understood as protecting certain California laws against preemption only by "this Act" [*i.e.*, the [1996 Farm Bill]) and any other provisions of federal statutory or regulatory law.

To reach its contrary conclusion, the Ninth Circuit in *Shamrock* paid lip service to the applicable clear-statement principle, but chose a far more expansive interpretation of the statute than its natural meaning. Judge Reinhardt's opinion for the court mocked petitioners' interpretation of the statute as one that would have required the Ninth Circuit to "conclude that the Commerce Clause, or, for that matter, the Full Faith and Credit Clause, or the provision of the Twenty-Second Amendment to the Constitution that prohibits the election of any person to the Office of President more than twice, do not constitute 'provisions of law.'" 146 F.3d at 1181. But statutory interpretation requires a contextual search for *meaning*, not a one-phrase-at-a-time parsing. As the Solicitor General correctly argues, the use of a form of the verb "construe" in Section 144 is one powerful indication that Congress meant to exempt the specified California laws and regulations from

federal regulations and statutes, not the Constitution. Another powerful indication is that Congress referred to "this Act or any other provision of law," a pairing most naturally read to suggest that Congress had statutory law in mind.[7] Words are, after all, "known by the company [they] keep[]." *Sprietsma* v. *Mercury Marine*, 123 S. Ct. 518, 526 (2002) (quoting *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 575 (1995)).

The applicable clear-statement rule forecloses any contrary argument. With more than one reasonable meaning (assuming that the *Shamrock* court's reading is reasonable at all), Section 144 is ambiguous. It would *not* "be plain to anyone reading the Act" that it constitutes Congress's consent to specified state requirements that might otherwise violate the Commerce Clause. *Gregory* v. *Ashcroft*, 501 U.S. at 467. "In the instances in which we have found such consent, Congress' intent and policy to sustain state legislation from attack under the Commerce Clause was expressly stated." *Sporhase*, 458 U.S. at 960 (internal quotation marks and citations omitted). There is no such express statement here.

2. The legislative history cannot provide the necessary unmistakably clear statement, and in any event does not support respondents at all

According to the Ninth Circuit in *Shamrock*, "the legislative history * * * demonstrates that Congress intended that the milk pricing and pooling scheme be included in the exemption as a means of effecting California's milk composition standards."

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[7] Congress often uses phrases such as "notwithstanding any other provision of law" in ways that make it absolutely obvious it is not attempting to provide an exemption from the Constitution. *E.g.*, 21 U.S.C. § 862b ("[n]otwithstanding any other provision of law, States shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances"). Congress also refers often to "the Constitution and laws" of the United States. *E.g.*, 42 U.S.C. § 1983.

146 F.3d at 1182; see Pet. App. A8 (similar conclusion by panel below). No portion of the legislative history, however, supports the proposition that California's pricing and pooling regulations have been granted a blanket exemption from the Commerce Clause. Rather, "the context in which Section 7254 was enacted supports the conclusion that it was intended solely to protect California's fluid milk composition and labeling laws against preemption by federal statutes and regulations." U.S. Br. 13 (filed Dec. 4, 2002).

We respectfully submit that legislative history can *never* supply "unmistakably clear" evidence of congressional intent when such evidence is lacking from the text of the statute. That principle finds support in both this Court's cases and logic. With respect to a similar "clear statement" rule, this Court has stated that "[e]vidence of congressional intent must be both unequivocal *and textual*." *Dellmuth* v. *Muth*, 491 U.S. at 230 (emphasis added); see also *Sporhase*, 458 U.S. at 960. And the only thing that is before *all* of the 535 Members of Congress who vote on a piece of legislation and the President who signs it is the *text* of the statute, not its voluminous legislative history. If something is unclear on the face of the statute, any clearer statement in the legislative history will, at a minimum, raise doubts about whether that statement appears in legislative history rather than statutory text precisely because it could not receive the assent of a majority of each House and the signature of the President. The very failure to put the clear statement into the text of the statute precludes the conclusion that *Congress* – as opposed to some subset of its Members – has made its intent unmistakably clear. See *C&A Carbone*, 511 U.S. at 410 (O'Connor, J., concurring in the judgment) (citing *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992); *Dellmuth* v. *Muth*, 491 U.S. at 230).[8]

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[8] See also *Lane* v. *Peña*, 518 U.S. 187, 192 (1996) (federal sovereign immunity); *Seminole Tribe* v. *Florida*, 517 U.S. 44, 56 (1996) (Elev-

If, despite these points, legislative history can *ever* provide the requisite unmistakable clarity when such clarity is absent from the text, then one would expect the text and legislative history to have several characteristics. The text would presumably make it passably, but not unmistakably, clear that Congress intended to exempt the very state laws at issue from the Commerce Clause. The legislative history would presumably be closely tied to the statutory text in a way that removed ambiguity from the very phrases being construed. It would presumably come from a very authoritative source (such as a Conference Report or, at the very least, a particularly authoritative Committee Report from one House or the other). And it would surely make explicit reference to the Commerce Clause, or *at least* the Constitution, and make explicit reference to the state laws being exempted, or *at least* make unmistakably clear reference to a genus of state laws being exempted.

Nevertheless, the Ninth Circuit gave dispositive weight to legislative history with *none* of those characteristics. The Ninth Circuit relied on two witness statements in a field hearing conducted in California by four Members of a Subcommittee long before any version of the 1996 Farm Bill was drafted. Neither witness mentioned the Commerce Clause or the Constitution at all. Neither witness mentioned "pooling." The one witness who mentioned "pricing" did so as part of a wish list of things he hoped Congress would do, but Congress granted a different one of his wishes in Section 144.

Approximately a year before the 1996 Farm Bill became law, and before any version of the bill was drafted, the Subcommittee on Dairy, Livestock, and Poultry of the House Committee on Agriculture held five hearings in dairy-producing locations around the country. See *Formulation of the 1995 Farm Bill*

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enth Amendment); *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 204 (1991) (same); *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 243 (1985) (same).

(Dairy Title): Hearings Before the Subcomm. on Dairy, Livestock, and Poultry of the House Comm. on Agriculture, 104th Cong., 1st Sess. (1995) (*1995 Field Hearings*). In essence, Members of the Subcommittee traveled around the country to receive the initial "wish lists" of each dairy-producing region.

The California dairy industry's representatives had their say in a hearing held April 20, 1995, in Tulare, California. *1995 Field Hearings* 425-599. Congressman Bill Thomas of California did not attend the hearing in person but submitted a short written statement. Because the Ninth Circuit relied on – and badly misconstrued – this legislative history, we reproduce it nearly in full. Congressman Thomas summed up California's wish list as follows:

> As most of you know, the California dairy industry has been very successful in recent years. A substantial part of that success is due to enormous growth in California's population. There are two other factors for the California dairy industry's success that I hope the Subcommittee will allow the State to preserve.
>
> First, the State of California has for over 30 years had a set of standards for fluid milk products which ensure a high quality product. These standards require addition of nonfat solids into low fat milk, making low fat milk taste like whole milk. Milk consumers also get more calcium and protein under these standards. The standards are strongly supported by consumers in California, by dairymen and by nutritionists interested in the health of children and women.
>
> Unfortunately, national nutritional labeling requirements may lead to the termination of California's system. These standards have come under assault recently by dairymen outside the state, who wish to ship lower standard, so-called "federal milk" into California. California's fluid milk standards are one area where a state really "knows

best." The California fluid milk market is almost totally self-contained–only 1% of the state's total consumption comes from out-of-state sources. The standards are not a barrier to milk produced in other states as, until recently, all *packaged* milk entering the state conformed to California standards. In a case such as this, where a state has had a very successful program for several decades, and where any burden on outside interests is largely theoretical, I would hope the federal government would not override that system.

In addition to all the nutrition and health reasons why California fluid milk standards should remain in place, there will be a very real impact on the federal deficit if the California standards are overridden. * * *

Unless the law is amended soon, California's standards may be eliminated. To give the State the ability to preserve a system that has served Californians well, I have introduced H.R. 1298. This bill would exempt California's standards from the federal requirement. Although the bill is not before the House Agriculture Committee, I hope you would join me in supporting it.

The California dairy industry has enjoyed great success for another reason: the pricing system for dairy products in California has been developed through a very flexible, market-oriented approach. Products are priced according to what the market dictates. California dairymen believe very strongly that this system must be retained. In fact, the Subcommittee may want to examine the California system, to see whether there are aspects of it which could serve as the basis for changes in the federal order system.

I also want to say a word about California's "make allowance" for manufactured dairy products. When Congress sought to override the California "make allowance" in section 102 of the 1990 Farm Bill, it involved USDA and

> dairymen in a morass. USDA recently suggested that section 102 should be rethought during development of the 1995 farm bill. In reconsidering the policy, I hope the Subcommittee will decide to allow California to retain its historic practice.
>
> The advantages of allowing California to preserve its make allowance are clear. * * *

Id. at 435-436 (underlining in original; italics added).

Congressman Thomas thus sounded three themes: (1) prevent "the federal government" from "overrid[ing]" California product composition and labeling requirements pertaining to the addition of nonfat solids into low-fat fluid milk by "exempt[ing] California's standards from the federal requirement"; (2) "retain[]" California's pricing system in general; and (3) "allow[] California to preserve its make allowance" by repealing Section 102 of the 1990 Farm Bill. With respect to *none* of those themes did Congressman Thomas mention the Commerce Clause. With respect to themes (1) and (3), he had specific amendments to federal legislation in mind, but theme (2) – retain California's pre-1995 pricing system – was merely general.

Other witnesses echoed some of the same themes – also without mention of the Commerce Clause. For example, Jim Tillison, on behalf of the Alliance of Western Dairy Producers, advocated maintaining California's "higher fluid milk standards" by "exempt[ing] California standards from NLEA preemption, remov[ing] the preemption of higher State standards by minimum Federal standards, or rais[ing] national fluid milk standards to California levels." *1995 Field Hearings* at 458; see also *id.* at 481-482 (statement of Craig S. Alexander on behalf of the Dairy Institute of California) ("Federal Milk Solids Standards. * * * It was of concern to our members that federal preemption of the California standards took place under the Nutritional Labeling and Education Act of 1990 without consid-

eration of the longstanding tradition of our program."); *id.* at 517-518 (prepared statement of A.J. Yates, Deputy Secretary of CDFA).

The Subcommittee Chairman, Congressman Gunderson, stated sympathy for the witnesses' position on NLEA relief. *1995 Field Hearings* at 476. He expressed less expectation that Congress – when it got around to drafting a bill – would give California what it wanted with respect to pricing: "[Witnesses] suggested that * * * California should have its own state order, its own state pricing system, its own state standards, its own state make allowance, but yet you want to have access to a national price support program to a national market. * * * I am not sure God could pass that through the U.S. Congress." *Id.* at 477.

As of February 9, 1996, when the House Committee on Agriculture reported favorably on a version of what was to become the 1996 Farm Bill, the proposed solution to the NLEA problem was to amend the federal standards to be the same as California's for solids-not-fat and milk-fat percentages. See H.R. REP. NO. 104-462, at 68, 94 (1996), *reprinted in* 1996 USCCAN 611, 641, 668. The Committee made no mention of the Commerce Clause.

On the floor of the House on February 28, 1996, however, Congressman Solomon of New York introduced an amendment – which ultimately passed – that replaced the entire dairy title of the Committee-approved bill with a new Title II. Included in the amendment were a proposed Section 204, which is worded essentially identically to what ultimately became Section 144 of the enacted statute,[9] and a proposed Section 205 that would have

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[9] The Solomon amendment used the phrase "continue in effect," which got changed to "continue to effect" in the enacted Section 144, and had one fewer comma than the final version. The changing of the common statutory phrase "continue in effect" to the unusual phrase "continue to effect" appears to have been a scrivener's error, but nothing in this case turns on the difference between the two phrases.

repealed Section 102 of the 1990 Farm Bill, former 7 U.S.C. § 1446e-1. 142 CONG. REC. H1480 (Feb. 28, 1996). Explaining his reasons for preferring his proposed Section 204 to the Committee-approved bill, Congressman Solomon explained:

> Solomon-Dooley also does not add extra solids into milk. Think about that. You do not want extra solids in your milk. You do not want that mandated down your throat, unlike the Gunderson bill. We do allow California to keep its existing standards if they see fit to do so.

Id. at H1481.

Congressman Bill Thomas of California – who had set out California's wish list in 1995 – also stated on the floor of the House his understanding of what the Solomon amendment would do (142 CONG. REC. H1486 (Feb. 28, 1996)):

> [W]e wanted to fortify our milk. Up until recently, we did what we wanted to do and left the rest of the country alone.
>
> What has occurred over the last several years is that California cannot do what it wants to do anymore. Here is a Federal court order [*Shamrock Farms Co.* v. *Veneman*, No. CIV-S-95-318, slip op. 3 (E.D. Cal. June 5, 1995)] telling California that they cannot enforce their own milk solid standards.
>
> There is no guarantee in the committee bill that we can do what we want to do. There is a guarantee in the Solomon bill.

After the House passed a bill that contained Section 204 of the Solomon amendment and a revised version of Section 205, and the Senate passed a bill with no corresponding provisions, the conferees accepted the House provisions. They explained:

> *(38) Effect on fluid milk standards in the State of California*
>
> * * *

> The conference-adopted bill provides the State of California an exemption from the preemption provisions of any Federal law respecting standards of identity and labeling for fluid milk.
>
> The State of California has had a system for requiring fortified fluid milk since the early 1960's. * * * These standards apply to all fluid milk sold at retail or marketed in the State of California.
>
> The Managers intend for the State of California to be able to fully enforce and apply its fluid milk standards and their attendant labeling requirements to all fluid milk sold at retail or marketed in the State of California. For purposes of this section, the managers intend "fluid milk" means milk in final packaged form for beverage use. (Section 144)

H.R. CONF. REP. NO. 104-494, at 338-339 (1996), *reprinted in* 1996 USCCAN 683, 701-702.[10]

Thus, Congressman Thomas got two of the three items on the wish list he had set out at the very beginning of consideration of farm legislation in the 104th Congress. In Section 144, the federal government was barred from overriding California product composition and labeling requirements pertaining to the addition of nonfat solids into low-fat fluid milk. In Section 145, 7 U.S.C. § 7255, California received relief from Section 102 of

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[10] Even after the Conference Report, there was further debate about the Farm Bill on the floor of the House before passage. In urging his colleagues to vote for the Conference-approved bill, Congressman Gunderson observed: "Section 144 is offered in an attempt to exempt California from existing Federal standards for the solids not fact [*sic*] content in Class I (fluid) milk. Regrettably, this section is drafted in such a way that the State standards would become a barrier to interstate commerce in fluid milk and, as a result, will likely spawn years of additional lawsuits on this issue." 142 CONG. REC. H3153 (Mar. 28, 1996). He obviously did not believe that Congress had insulated anything from Commerce Clause scrutiny in Section 144.

the 1990 Farm Bill, former 7 U.S.C. § 1446e-1, which was repealed, although Section 145 itself placed new restrictions on States' allowable "manufacturing allowances" (make allowances). No section of the 1996 Farm Bill, however, enacted Congressman Thomas's general wish to "retain" California's pricing system.[11]

The tenor of the discussion of what ultimately became Section 144 throughout the legislative history *confirms* what is plain on the face of the statute. It is concerned with federal statutory preemption of a specific aspect of California's composition and labeling requirements for fluid milk, not with constitutional limitations on California's economic regulation of raw milk.

C. The Ninth Circuit's Misconstruction of Section 144 Insulates from Review a Serious Commerce Clause Challenge

The underlying constitutional question – whether CDFA's Stabilization and Pooling Plans as applied to out-of-state raw milk transactions beginning in 1997 violate the Commerce Clause – is not before this Court. Nonetheless, the Ninth Circuit's treatment of Section 144 insulates from review a serious violation of the Commerce Clause involving both a direct burden on interstate commerce and discrimination against non-California milk production.

Indeed, two neutral observers have indicated that the 1997 amendments present a serious Commerce Clause question. In particular, the California Legislative Counsel was asked by California state legislators to review the 1997 amendments. The

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[11] Arguably, Section 143(a)(2) of the enacted Farm Bill, 7 U.S.C. § 7253(a)(2), JA 17, shows that Congress as a whole pushed in the *opposite* direction from Congressman Thomas's desire. That section invites California into the Federal Milk Marketing Order system – an invitation, though not a command, for California to *abandon* the very pricing system Congressman Thomas wanted to "retain."

Legislative Counsel concluded, and advised CDFA, that the amendments were protectionist in intent and effect and violated the Commerce Clause. App., *infra*, 3a-11a.[12] And, on invitation from this Court, the U.S. Solicitor General filed an amicus brief stating: "Although the United States does not take a position on the underlying constitutional question in this case, the California milk pricing and pooling laws, at a minimum, raise substantial questions under the Commerce Clause because of their facially disparate treatment of California dairy farmers and dairy farmers located outside the State." U.S. Br. 15-16 (filed Dec. 4, 2002).

Decades of this Court's Commerce Clause jurisprudence have struck down state dairy regulations aimed at insulating local dairy industries from interstate competition. In the seminal case of *Baldwin* v. *G.A.F. Seelig, Inc.*, this Court unanimously struck down a New York minimum price regulation as it applied to out-of-state raw milk because New York was attempting to project its minimum price regulation into other States. 294 U.S. 511, 524 (1935).

Baldwin involved a minimum price regulation that was adopted to ensure that New York dairy farmers would receive an adequate price for their milk. Under the regulation, New York milk processors were required to pay the minimum price when purchasing milk from New York farms. New York's power to enact that measure was not questioned. However, the corresponding regulation that was intended to prevent out-of-state milk from having a competitive advantage in light of the minimum price regulation was challenged. 294 U.S. at 519. This Court concluded that the regulation as it applied to out-of-state milk transactions (where title was taken in Vermont) directly burdened interstate commerce and violated the Commerce

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[12] In California, opinions of the Legislative Counsel, though not binding, are entitled to great weight. *California Ass'n of Psychology Providers* v. *Rank*, 51 Cal. 3d 1, 17, 793 P.2d 2, 11, 270 Cal. Rptr. 796, 805 (1990).

Clause because "*commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another*, in the faith that augmentation of prices will lift up the level of economic welfare." *Id.* at 524 (emphasis added). The Court added that "[n]ice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. Such an obstruction is direct by the very terms of the hypothesis." *Id.* at 522.[13]

More recently, in *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186 (1994), this Court struck down a Massachusetts pricing order that bears a striking resemblance to the challenged pooling amendments. The Massachusetts pricing order required payment into a pool by all farmers, including out-of-state farmers, but distributed that money as a subsidy to in-state farmers only. As a result, the pool payment was neutralized vis-à-vis Massachusetts farmers, but nevertheless burdened out-of-state farmers. *Id.* at 199. In that case, this Court explained that "[t]he pricing order thus violates the cardinal principle that a State may not 'benefit in-state economic interests by burdening out-of-state competitors.'" *Ibid.*

With the adoption of the 1997 amendments, California has taken to projecting its regulation into surrounding States and has

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[13] The application of California's statutory minimum-price provisions – Cal. Food & Agric. Code §§ 62077-62078, JA 25 – to out-of-state dairy farmers is such a clear violation of the core holding of *Baldwin* that CDFA officials announced that they would not enforce those provisions against out-of-state dairy farmers, and the district court entered a preliminary injunction to ensure that they would not be so enforced. See C.A. E.R. Tab 7 at 5 & n.4. The Ninth Circuit's construction of Section 144, however, calls into question the applicability to California of even the most settled of Commerce Clause principles and precedents.

done so with the purpose of suppressing or mitigating the consequences of competition between States. Moreover, this action has resulted in disparate treatment that burdens out-of-state dairy farmers for the benefit of in-state dairy farmers.

Just as New York extended its minimum price regulation to out-of-state raw milk transactions in *Baldwin* in order to mitigate the consequences of competition from unregulated out-of-state raw milk, CDFA adopted the 1997 amendments for a similar protectionist purpose. This is shown by the circumstances that gave rise to the adoption of the challenged amendments, as well as by the express statements of CDFA officials.

The California Stabilization and Pooling Plans were conceived of during a time of geographic isolation and as a result were not designed to withstand the forces of interstate competition. For example, until the mid-1990s, California's relative geographic isolation gave the State the ability to avoid many of the ordinary forces of competition in a national market. ROBERT D. BOYNTON, MILK MARKETING IN CALIFORNIA: A DESCRIPTION OF THE STRUCTURE OF THE CALIFORNIA DAIRY INDUSTRY AND THE GOVERNMENT PROGRAMS UNDER WHICH IT OPERATES 1 (5th ed. 1995) ("The uniqueness of the California System developed largely because of the state's geographic isolation."). By setting Class 1 prices high (compared to fluid milk prices prevailing elsewhere in the region) and Class 4a and 4b prices low (compared to manufacturing milk prices prevailing elsewhere in the nation), California was able, through pooling, to bring about blend prices that were high enough to provide adequate income to dairy farmers to encourage growth in milk production, while also providing manufacturers of non-beverage (non-Class 1) dairy products the prospect of cheap prices and easy access to raw milk inputs and thus an incentive to locate manufacturing facilities in California. Geoffrey Vanden Heuvel,

Milk Producers Council Newsletter, Commentary on Class 1 Findings at 3-4 (March/April 1997), P.I. App. Tab 5 at 1-2.[14]

When technology and advances in transportation made it more economical to ship into California from out of state, the system of cross-subsidization began to invite competition that California dairy farmers did not welcome. High California Class 1 prices attracted out-of-state competition, especially in southern California. Because out-of-state milk did not participate in the California Pool, every time a California producer lost a Class 1 sale to an out-of-state dairy farmer, the California Pool lost revenue. P.I. App. Tab 5 at 2 ("The out-of-state milk decision is a step in the right direction, but time will tell if it is effective in stopping the leakage of Class 1 revenue out of the pool."). Thus, the California dairy industry recognized the need to insulate the Pool through other means.

Accordingly, the challenged amendments were conceived of and proposed by California farm groups that had been working with CDFA officials for months to resolve what they referred to as "the out-of-state milk problem." See C.A. E.R. Tab 11K at 2. In fact, an official designated as spokesperson for CDFA indicated to a member of the California Legislative Counsel's staff that the 1997 amendments were intended to keep out-of-state milk out of California. App., *infra*, 1a-2a.

In its summary of the hearing testimony, CDFA revealed the protectionist underpinnings of the 1997 amendments when it acknowledged that one of the objectives of the proponents of the 1997 amendments was to *make sure that California's Class 1 needs were supplied by California dairy farmers*. CDFA, Analysis of Pooling Hearing February 4, 1997, at 4, C.A. E.R. Tab 11R at 4. In fact, out-of-state milk was and to

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[14] "P.I. App." refers to the appendix to the motion of plaintiffs Hillside Dairy et al. for preliminary injunction and partial summary judgment, filed in the district court June 27, 1997.

this day is perceived by California dairy farmers as a serious threat to their blend prices because it causes "the leakage of Class 1 revenue out of [their] pool." Geoffrey Vanden Heuvel, Milk Producers Council Newsletter, Commentary on Class 1 Findings at 3-4 (March/April 1997), P.I. App. Tab 5 at 1-2; see also *Out-of-state milk flooding California*, DAIRY PROFIT WEEKLY, May 27, 2002, at 2.

The 1997 amendments are protectionist in effect as well as design. As in *Baldwin* v. *Seelig*, the 1997 Stabilization Plan and Pooling Plan amendments directly burden interstate raw milk transactions.

In particular, the 1997 Pooling Plan amendments imposed a direct burden on interstate milk transactions when, for the first time, out-of-state milk was pooled. Forced taking of out-of-state farmer revenue is effectuated through the establishment of a gross pool obligation (equal to the plant blend price, which is the total minimum price obligation of an individual plant) and a credit (equal to the lesser of the modified quota blend price or the plant blend price). Pooling Plan § 900(d), JA 47-48. The obligation owed directly to the California pool is the difference between the plant blend price and the credit.

Thus, under the 1997 amendments, when the plant blend price exceeds the quota blend price (as is usually the case), no longer may the out-of-state dairy farmer receive payment of the full value of his transaction – the plant blend price. Rather, because of the 1997 amendment, CDFA no longer permits the California processor to leave out-of-state milk out of its pool obligation calculation. Sturgeon Aff. ¶¶ 7-8, Plaintiffs' Joint Compilation of Affidavits in Support of Motion for Summary Judgment Tab 5 at 2 (filed in district court April 12, 1999) (Joint Compilation). Instead, out-of-state milk is now included, but the processor receives a credit against the minimum (plant blend) price of only the quota blend price (because it is the lesser credit) and must pay the difference between the plant blend price

and the quota blend price[15] into the Pool. This transaction closely resembles the credit and compensatory payment to a federal milk pool that this Court condemned as a trade barrier in *Lehigh Valley Coop.* v. *United States*, 370 U.S. 76, 84-85 (1962). As in *Lehigh*, all incentive for the processor to pay the out-of-state farmer more than the credited (quota blend) price is removed.

Indeed, out-of-state dairy farmers have been unable to charge prices in excess of the credit assigned by CDFA. Gruebele Aff., C.A. E.R. Tab 11M at 3; see also Sturgeon Aff. ¶¶ 14-15, Joint Compilation Tab 5 at 2. Thus, CDFA has imposed a tariff on out-of-state milk purchases equal to the difference between the gross pool obligation and the administratively determined credit. This tariff is directly borne by the out-of-state dairy farmer: the 1997 amendments had the direct effect of reducing, dollar for dollar, the amount paid to out-of-state producers by the amount processors were required to pay into the California pool. Gruebele Aff., C.A. E.R. Tab 11M at 3; see also Sturgeon Aff. ¶¶ 14-15, Joint Compilation Tab 5 at 2. This revenue reduction directly reduced the profitability of shipping milk from out of state into California and for some dairies simply made it no longer worthwhile to ship milk into California. For instance, Milky Way Farms, a northern Nevada dairy farm that had been shipping to Sacramento since the 1960s and was heavily dependent on milk sales into California, made the decision to go out of the dairy farming business in the face of lower returns. Witt Decl. ¶¶ 15-16, C.A. Supp. E.R. Tab 1 at 3. In other instances, dairies facing the prospect of diminishing

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[15] Although it does not alter the fact that this change directly burdens out-of-state milk transactions and causes discriminatory treatment of out-of-state milk, the credit is actually a modified quota price. It is approximately 3 cents higher than the quota price and is adjusted so that out-of-state milk is not required to fund the transportation allowance program. Gruebele Aff., C.A. E.R. Tab 11M at 4; Gruebele Supp. Decl. ¶ 23, C.A. E.R. Tab 11N at 9.

marginal returns reacted by increasing herd size. Olsen Decl. ¶ 8, C.A. Supp. E.R. Tab 2 at 2; Ligtenberg Decl. ¶ 18, C.A. Supp. E.R. Tab 3 at 3.

Moreover, by mandating the pooling of out-of-state milk without also granting to out-of-state farmers full access to the benefits of pooling, the 1997 amendments subjected out-of-state dairy farms to disparate treatment that benefited California farmers at the expense of out-of-state farmers in violation *of West Lynn Creamery* v. *Healy*, *supra*.

First, the challenged amendments required the out-of-state dairy to give a portion of its raw milk revenue to the California pool, which increased the overall size of the California pool, making more money available for distribution to California farmers, while decreasing the price received by the out-of-state farmer by the amount of the required pool contribution. Gruebele Aff., C.A. E.R. Tab 11M at 2-3; Milk Pool Referendum Post Card Ad, The Alliance of Western Milk Producers, P.I. App. Tab 27.

Second, although the out-of-state farmer may *in some circumstances* receive the quota price (*i.e.*, the highest blend price paid to California farmers owning quota), the out-of-state farmer can never receive the true "benefit" of quota, which includes the assurance of receiving the blend price without regard to competition or plant destination. Gruebele Supp. Decl. ¶ 25, C.A. E.R. Tab 11N at 9; Comparison of Milk Marketing Orders at 6, C.A. E.R. Tab 11B at 6. The asset value ($500 or more per hundredweight) is another benefit of quota ownership that out-of-state dairy farmers are denied. History of the California Milk Pooling Program at 8, C.A. E.R. Tab 11C at 8. On the free market, quota can be bought and sold for $500 or more per hundredweight. CDFA, California Dairy Review, Quota Transfer Summary at 2 (Feb. 2003) <http://www.cdfa.ca.gov/dairy/pubs/DairyRvw/index.html>.

Third, although out-of-state producers serve many of the markets in California that would otherwise entitle them to transportation allowances, because of their out-of-state status they cannot receive these transportation allowances. Pooling Plan Art. 9.2 <http://www.cdfa.ca.gov/mkt/mp/POOLPLAN_09-01.pdf>. This creates an artificial incentive for California processors to choose California milk over out-of-state milk. Effects of this type consistently have been held unconstitutional by this Court. See *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361 (1964); *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 576 (1997); *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525 (1949).

Petitioners, again, do not ask or expect this Court to resolve the merits of the constitutional issues raised in the courts below. The deep problems of protectionism and disparate treatment of out-of-state milk producers discussed above, however, demonstrate the magnitude of the matters that will go unscrutinized if the decision below is affirmed. This brief description of the constitutional problems also shows the utter lack of resemblance between the issues Congress addressed in the text and legislative history of Section 144 and the subject matter of this litigation. Economic protectionism of the sort petitioners challenge simply has nothing to do with California's desire and Congress's permission to keep California's historic compositional standards for fluid milk.

II. THE NINTH CIRCUIT'S SUMMARY TREATMENT OF THE PRIVILEGES AND IMMUNITIES CLAUSE CLAIMS ERRONEOUSLY DECLINED TO CONSIDER THE PRACTICAL EFFECT OF THE REGULATORY SCHEME ON OUT-OF-STATE DAIRY FARMERS

The Privileges and Immunities Clause was designed by the Framers to help preserve the economic union of the States by protecting individuals from discrimination in the pursuit of common callings within a State, or in the ownership or

disposition of privately held property, on the basis of out-of-state residency or citizenship. *Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274, 279-280 (1985); *United Building & Construction Trades Council* v. *Mayor and Council*, 465 U.S. 208, 219 (1984) ("Certainly, the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause.").

As it did in its disposition of Commerce Clause claims, the Ninth Circuit avoided the underlying merits of the claims under the Privileges and Immunities Clause raised by individual dairy farmers, petitioners Darrel and Diane Kuiper of Buckeye, Arizona. As in its approach to the Commerce Clause claims, the Ninth Circuit erred at the threshold of analysis of Privileges and Immunities Clause jurisprudence by circumventing long-established constitutional doctrine.

The Ninth Circuit's analysis of the individual dairy farmers' claims under the Privileges and Immunities Clause, U.S. CONST. Art. IV, § 2, cl. 1, went no further than an examination of the classifications made on the face of California's Milk Pooling Act, Cal. Food & Agric. Code §§ 62700-62756 (JA 25-31), and the regulations under that Act, *i.e.*, the Pooling Plan (JA 32-60). Because the alleged discrimination effected by the milk pooling scheme is based on the location of the farm where milk is produced,[16] and not the residency or

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[16] Discrimination against out-of-state milk farms, as alleged in Ponderosa's complaint and apparent on the face of state pooling laws, is illustrated by the following: (1) only California milk producers are eligible to vote in referenda to approve or disapprove state pooling plans; (2) California milk "quota" is a valuable property interest that only California milk producers are eligible to acquire, hold, transfer, and devise; (3) only California producers were awarded "quota" by the State of California, and only California producers are eligible to receive additional state-established quota, as it becomes available; (4) a California producer is guaranteed the same revenue-pooled price for milk sold to all California plants, regardless of the value of the

citizenship of the producer, the court rejected the individual dairy owners' privileges and immunities claim. Pet App A14.

The Ninth Circuit cited no decision of this Court for its conclusion that only facial discrimination on the basis of residency or citizenship is forbidden by the Privileges and Immunities Clause. This is not surprising, because the Ninth Circuit's approach of examining only the form of the legislation, and not its substance or practical effect, is contrary to this Court's precedent respecting the enforcement of constitutional rights generally and the Privileges and Immunities Clause in particular. In *Gregg Dyeing Co.* v. *Query*, 286 U.S. 472, 476 (1932), the Court speaking through Chief Justice Hughes emphasized that it is the substance of state laws that must be examined in determining their conformity to the strictures imposed by the United States Constitution:

> In maintaining rights asserted under the Federal Constitution, the decision of this Court is not dependent upon the form of a taxing scheme, or upon the characterization of it by the state court. We regard the substance rather than the form, and the controlling test is found in the operation and effect of the statute as applied and enforced by the state.

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milk to the plant under the state's classified pricing plan, while out-of-state producers bear the risk of price volatility between classes of use, and have fewer marketing opportunities to California's many dairy product manufacturing plants; (5) California milk producers are eligible to receive subsidies for the cost of transporting milk to a fluid milk processing plant, while out-of-state producers serving the same plant are never eligible for transportation allowances; (6) out-of-state producers are the only group who are unable to participate fully in the benefits of the state milk pool, but whose revenues are nonetheless taken for contribution to the revenue pool, thus subsidizing the income of their California competitors.

Discrimination is a "practical conception," and a court "must deal in this matter, as in others, with substantial distinctions and real injuries." *Gregg Dyeing*, 286 U.S. at 481; accord *Associated Indus.* v. *Lohman*, 511 U.S. 641, 654 (1994); see also *American Oil Co.* v. *Neill*, 380 U.S. 451, 455 (1965) ("When passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of the tax, that is, substance rather than form."). The rights of citizens established under the Constitution, obviously, cannot be made subservient to clever drafting or legislative formalism. Discrimination is discrimination, whether "forthright or ingenious," direct or indirect. *West Lynn Creamery*, 512 U.S. at 201-202.

As in Commerce Clause cases, this Court's application of the Privileges and Immunities Clause has consistently involved an examination of the practical effects of state laws and regulations when a State's discrimination against out-of-state residents is not expressed on the face of those laws. In *Chalker* v. *Birmingham & N.W. Ry.*, 249 U.S. 522 (1919), a Tennessee privilege tax on railroad construction companies was struck down as discriminatory against nonresidents even though the discrimination was not based on residency or citizenship *per se*, but was based on whether a company had its principal office within Tennessee. Rejecting the conclusion of the state court that there was no discrimination on the basis of residency because the higher tax depended on the location of the company's principal office, this Court wrote:

> As the chief office of an individual is commonly in the state of which he is a citizen, Tennessee citizens engaged in constructing railroads in that state will ordinarily have their chief offices therein, while citizens of other states so engaged will not. Practically, therefore, the statute under consideration would produce discrimination against citizens of other states by imposing higher charges against them than citizens of Tennessee are required to pay. We

> can find no adequate basis for taxing individuals according to the location of their chief offices—the classification, we think, is arbitrary and unreasonable.

Id. at 527. *Chalker* establishes that it is the practical effect of a state law, and whether in practice it produces discrimination against nonresidents, that determines whether the law violates the Privileges and Immunities Clause.

Other cases since *Chalker* confirm that substance, not form, guides the analysis under the Privileges and Immunities Clause. In *Austin* v. *New Hampshire*, 420 U.S. 656 (1975), a law taxing the income of nonresidents working in New Hampshire was held to violate the Privileges and Immunities Clause because its burden fell disproportionately on nonresidents – in-state residents' income was not taxed. The Court reviewed the decisions in *Shaffer* v. *Carter*, 252 U.S. 37 (1920), and *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920), which also determined the validity of state income tax schemes under the Privileges and Immunities Clause, and noted that those cases put aside "'theoretical distinctions'" and looked to "'the practical effect and operation'" of the tax scheme at issue. Justice Marshall wrote for the Court in *Austin* that the New York scheme at issue in *Travis* "could not be sustained when its actual effect was considered" by the Court. *Austin*, 420 U.S. at 664. In *Shaffer*, 252 U.S. at 55, the Court held that "where the question is whether a state taxing law contravenes rights secured by [the federal Constitution], the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed."

Contrary to the Ninth Circuit's ruling here, this Court has "never read the [Privileges and Immunities] Clause so literally as to apply it only to distinctions based on state citizenship." *United Building & Construction Trades Council* v. *Mayor and Council*, 465 U.S. at 216. *Chalker* and the other authorities just cited examine the effect of state laws and regulations and

not merely the words used by the lawmaking body. These cases warn against allowing States to evade the limitations of the Privileges and Immunities Clause simply by drafting laws in ways that avoid facial distinctions on the basis of residency or citizenship. The cases have rejected a "formalistic construction" of the Clause under which a law "would be immune from scrutiny * * * simply because it was not *phrased* in terms of state citizenship or residency"; such a construction "would effectively write the Clause out of the Constitution." *United Building*, 465 U.S. at 217 n.9 (emphasis added).[17]

Practical effect also is the test for compliance with restrictions on state regulation of commerce under the Commerce Clause, which has in common with the Privileges and Immunities Clause the purpose of promoting interstate harmony and creating a national economic union. *Supreme Court of New Hampshire* v. *Piper*, 470 U.S. at 279-280. *In Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 (1951), this Court held invalid an ordinance requiring that milk sold within a city have been pasteurized within a five-mile radius of the city center, explaining as follows:

> [T]his regulation, like the provision invalidated in *Baldwin* v. *Seelig, Inc.*, [294 U.S. 511 (1935)], in practical effect

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[17] In *United Building*, a municipal ordinance of the City of Camden required that at least 40% of the employees of contractors working on city construction projects be Camden residents. The Supreme Court of New Jersey rejected a Privileges and Immunities Clause claim on the ground that the ordinance had identical effects on out-of-state citizens and New Jersey citizens not residing in Camden. In an opinion by then-Justice Rehnquist, this Court reversed by a 8-1 vote, concluding (465 U.S. at 217-218) that "Camden's ordinance is not immune from constitutional review at the behest of out-of-state residents merely because some in-state residents are similarly disadvantaged." As would be appropriate in the present case, the Court "remand[ed] the case for a determination of the validity of the ordinance under the appropriate constitutional standard." *Id.* at 210.

> excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois. * * * In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce.

That the ordinance also discriminated against Wisconsin producers did not mitigate the fact that the practical effect of the ordinance was to discriminate against interstate commerce. Thus, a determination that a state law does not discriminate on its face and purports to regulate even-handedly does not end the question of what level of Commerce Clause scrutiny should apply. "When a statute discriminates 'in practical effect' against interstate commerce, the fact that it purports to apply equally to citizens of all states does not save it." *Government Suppliers Consolidating Services, Inc.* v. *Bayh*, 975 F.2d 1267, 1278 (7th Cir. 1992) (citing *Brimmer* v. *Rebman*, 138 U.S. 78 (1891)), cert. denied, 506 U.S. 1053 (1993).

The practical effect of laws and regulations must guide the determination of whether those laws contravene the purpose of the Privileges and Immunities Clause to "'place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.'" *Hicklin* v. *Orbeck*, 437 U.S. 518, 524 (1978) (quoting *Paul* v. *Virginia*, 75 U.S. (8 Wall.) at 180). Although the lower courts did not reach the merits, it cannot be doubted that the practical effect and intent of California's Milk Pooling Act and implementing regulations is to discriminate between milk producers who do not reside in California and those who do, and the distinctions thus drawn should be scrutinized on the merits.

Data and experience indicate that the vast majority of persons engaged in the production of milk reside on the farms producing the milk. See note 3, *supra*. By discriminating on the basis of the location of the farm where milk is produced, and favoring milk produced on in-state farms, the California

plans have the natural effect of discriminating against producers because they do not reside in California. Unless California can somehow justify the differential treatment on remand, this violates a fundamental guarantee of the Privileges and Immunities Clause. "[I]t was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." *Toomer* v. *Witsell*, 334 U.S. at 396.

The Ninth Circuit's reliance on the distinctions made on the face of a state law or regulation allows the Clause to be avoided by exalting form over substance. That approach is contrary to the teachings of this Court and invites States of the Ninth Circuit to craft discrimination against non-residents by ingenious and indirect means. The judgment on the individual petitioners' Privileges and Immunities Clause claim should be reversed and the case remanded for consideration of that claim.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

LAWRENCE S. ROBBINS
ROY T. ENGLERT, JR.
ROBBINS, RUSSELL, ENGLERT
ORSECK & UNTEREINER LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

CHARLES M. ENGLISH, JR.*
WENDY M. YOVIENE
NICHOLAS C. GEALE
THELEN REID & PRIEST, LLP
701 Pennsylvania Ave., N.W.
Suite 800
Washington, D.C. 20004
(202) 508-4000

* *Counsel of Record, 01-950*

JOHN H. VETNE
15 Powow St.
Amesbury, MA 01913
(978) 388-2480

RICHARD HESSE**
2 White Street
Concord, NH 03301
(603) 228-1541

** *Counsel of Record, 01-1018*

FEBRUARY 2003

APPENDIX

DECLARATION OF FRANCES S. DORBIN, PRINCIPAL DEPUTY LEGISLATIVE COUNSEL

[reprinted from Appellants' Supplemental Excerpts of Record, filed in the Ninth Circuit April 10, 2000]

I, Frances S. Dorbin, declare upon personal knowledge as follows:

1. I am employed as a Principal Deputy Legislative Counsel in the Office of Legislative Counsel.

2. The Office of Legislative Counsel is a nonpartisan office of legal advisors to, among others, the California Assembly and the California Senate, which assists in writing proposed legislation, provides analysis of legislation, and provides opinions concerning, among other things, California laws and regulatory activities.

3. During or about early November 1996, I was assigned responsibility to research and prepare a response to a request from Assembly Member John Burton for a written opinion concerning the constitutionality of proposed regulatory amendments to the California Milk Pooling Plan.

4. In the course of my duties relating to the opinion assignment, I contacted by telephone the Milk Pooling Branch of the California Department of Food and Agriculture to solicit information on the nature and purpose of the proposed amendments.

5. I was put in telephone contact with a pooling branch employee who identified himself as Mr. John Lee.

6. Mr. Lee told me that he was aware of and familiar with the pooling plan proposals to change regulatory treatment

of out-of-state milk. He told me that the proposals were intended to "keep those guys out." From the context of our conversation, I understood the comment to mean keeping out-of-state milk producers out of California.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 7th day of April, 1999.

/s/ Frances S. Dorbin

Frances S. Dorbin

Legislative Counsel of California

BION M. GREGORY

Sacramento, California
June 19, 1997

[reprinted from appendix to memorandum by plaintiffs Hillside Dairy, Inc., et al. in support of motion for preliminary injunction, filed in the district court June 27, 1997]

Honorable Charles M. Calderon
313 State Capitol

Milk Pooling - #12484

Dear Senator Calderon:

QUESTION

Would the amendments that are proposed to be made to the Pooling Plan For Market Milk that would restrict the price that out-of-state producers of milk could receive for that product to no more or less than the price received by in-state producers for market milk, if adopted, violate the Commerce Clause of the United States Constitution?

OPINION

The amendments that are proposed to be made to the Pooling Plan For Market Milk that would restrict the price that out-of-state producers of milk could receive for that product to no more or less than the price received by in-state producers for

market milk, if adopted, would violate the Commerce Clause of the United States Constitution.

ANALYSIS

Pursuant to the provisions governing the stabilization and marketing of market milk (Ch. 2 (commencing with Sec. 61801), Pt. 3, Div. 21, F.& A.C.[1]), the Secretary of Food and Agriculture (hereafter the secretary) is authorized to formulate stabilization and marketing plans for market milk (Sec. 61993). For the purposes of stabilization and market plans, market milk is classified as class 1, class 2, class 3, class 4a, and class 4b (see Art. 5 (commencing with Sec. 61931), Ch. 2, Pt. 3, Div. 21). The stabilization and marketing plans are required to contain provisions whereby the secretary establishes minimum prices to be paid by handlers to producers for market milk in the various classes (Sec. 62062). Prior to 1967, producers competed fiercely to supply bottling plants with class 1 milk, because class 1 milk commands the highest price (see Senate Floor Analyses, S.B. 688, June 8, 1993).

In 1967, the Legislature enacted the Gonsalves Milk Pooling Act (Ch. 3 (commencing with Sec. 62700), Pt. 3, Div. 21; (hereafter Chapter 3)), which contains a comprehensive scheme for milk pooling. Pursuant to Chapter 3, the secretary is authorized to develop a pooling plan (Sec. 62704) under which each producer is assigned a pool quota (subd. (d), Sec. 62707). A producer's quota determines the amount of class 1 milk the producer can sell to handlers within the pooling system. Milk sold in excess of quota receives the lowest base price, namely, that price for milk destined for class 4b products (Sec. 62711).

The current pooling plan only applies to producers who produce market milk in California (Sec. 104, Pooling Plan for

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[1] All section references are to the Food and Agricultural Code, unless otherwise specified.

Market Milk, as amended, effective April 1, 1997[2]). Producers who produce market milk outside of California and ship that milk into this state currently receive the plant blend price for that milk (see testimony of Glen Gleason, Chief, Milk Pooling Branch, Department of Food and Agriculture, before the Subcommittee on Livestock, Dairy and Poultry, United States House of Representatives, May 23, 1995).

Amendments have been proposed to the current pooling plan by referendum (hereafter the amendments) that would change the way certain milk is accounted for in the pool (Milk Pooling Branch, Pooling Plan for Market Milk, Explanation of Referendum). In particular, the proposed amendments would create a new category of milk known as "other source milk."[3] If the referendum is adopted, other source milk will never receive a pool credit greater than the monthly quota price or less than the nonquota price, adjusted by the pool price modification rate (Explanation of Referendum Ballots Mailed March 31, 1997). Thus, the amendments would set both a minimum and maximum price that a producer of other source milk could receive from a handler. In particular, under the proposed amendments, other source milk would receive the lower of the receiving plant's inplant usage credit for the month or the

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[2] All further references to the Pooling Plan for Market Milk are to that plan as amended, effective April 1, 1997.

[3] "Other source milk" is not currently defined in the Pooling Plan for Market Milk and it was not included in the referendum materials forwarded to us by the Milk Pooling Branch of the Department of Food and Agriculture. Kelly Jensen of your staff obtained additional materials from the Milk Pooling Branch that include a definition of "other source milk." According to that material, "other source milk" is "any market milk, skim or cream from a dairy ranch or milk plant not defined in this [plan]." Bob Horton of the Milk Pooling Branch informed Mr. Jensen that this definition is intended to apply to milk produced out of state.

announced monthly quota price plus the pool price modification rate (proposed subd. (d) (1), Sec. 900, the amendments). The amendments would also establish a minimum price for other source milk based on the current month's overbase fat price for the milk fat component and the current month's overbase solids not fat price plus the pool price modification rate (proposed subd. (d) (2), Sec. 900, the amendments).

Consequently, the net effect of these changes would be to restrict the price that an out-of-state producer may receive for market milk sold in this state to no greater or less than the price that an in-state producer receives for that product.

In that regard, however, the pooling plan also establishes a system of transportation allowances and credits for which the producers are eligible (see Article 9.2 (commencing with Section 920), Pooling Plan for Market Milk). The purpose of those allowances and credits is to provide an incentive for producers to make milk available to bottling plants (California Department of Food and Agriculture, Milk Pooling Branch, History of the Milk Pooling Program, undated, p. 5). These rates are calculated on the constructive miles from the dairy farm to the location of the plant of first receipt and apply to all pool milk (Sec. 921.2, Pooling Plan for Market Milk). The rates vary, depending on the location of the plant, and the distance the milk is shipped. For example, milk transported over 199 miles to plants located in the San Francisco bay area receiving area, which consists of the Counties of Alameda, Contra Costa, Santa Clara, Santa Cruz, San Francisco, and San Mateo, receives an allowance at the rate of $0.30 per hundred pounds of milk (para. (1), subd. (a), Sec. 921.2, Pooling Plan for Market Milk). On the other hand, milk transported 74 or fewer miles from the Counties of Fresno, Kern, Kings, and Tulare to plants located in the southern California receiving area, which consists of the Counties of Los Angeles, Orange, and Ventura, receives no allowance (para. (2), subd. (e), Sec. 921.1, Pooling Plan for Market Milk).

Under the amendments, producers of other source milk would not be eligible for the transportation allowances and credits, but the price they receive would be subject to the pool price modification rate. The pool price modification rate is an average rate calculated for each pool month by dividing the total value of the plant-to-plant transportation adjustments plus the total value for transportation allowances by the total pounds of solids not fat for receipts from producers and for other source milk (proposed Sec. 132, the amendments).

Thus, in summary, the amendments would restrict the price that an out-of-state producer may receive for market milk sold in this state to no greater than the price that an in-state producer receives for that product, as adjusted by an average amount for transportation costs. The amendments would also set a maximum price that an out-of-state producer may receive for market milk sold in this state.

The Commerce Clause of the United States Constitution grants to Congress the power "[t]o regulate Commerce with foreign nations, and among the several States ..." (Cl. 3, Sec. 8, Art. I, U.S. Const.), but places no express limits on the power of the states to regulate that commerce. "Nevertheless, the United States Supreme Court has repeatedly held for over a century that the commerce clause also limits the states' power to regulate both domestic interstate and foreign commerce, whether or not Congress has acted (citations omitted)" (Pacific Merchant Shipping Assn. v. Voss, 12 Cal. 4th 503, 514, cert. den. sub nom. Veneman v. Pacific Merchant Shipping Assn., 134 L. Ed. 2d 951.) As a consequence, any state statute or regulation that impacts domestic interstate or foreign commerce is subject to judicial scrutiny under the commerce clause unless the statute or regulation has been preempted, or unless explicitly authorized, by an act of Congress (Ibid.). The commerce clause's implicit, self-executing restriction on the states' power to regulate domestic interstate and foreign commerce is commonly referred to as the "negative" or "dormant" commerce clause

(Barclays Bank v. Franchise Tax Bd. of California, 129 L. Ed. 2d 244, 257 fn. 9).

In analyzing any law subject to scrutiny under the negative commerce clause, the threshold inquiry is whether the law "'regulates evenhandedly with only "incidental" effects on interstate commerce, or discriminates against interstate commerce.'" (Pacific Merchant Shipping Assn. v. Voss, supra, at pp. 513-514). In the context of a challenge to a statute on the basis of the commerce clause, "'discrimination' simply means differential treatment of in-state and out-of-state interests that benefits the former and burdens the latter [citation omitted]. Such discrimination may take any of three forms: first, the state statute may facially discriminate against interstate or foreign commerce; second, it may be facially neutral but have a discriminatory purpose; third, it may be facially neutral but have a discriminatory effect (citation omitted)" (Id., at p. 514). The party challenging the law's validity has the burden of showing discrimination (Ibid.).

The second step of the analytical process is the application of the appropriate level of scrutiny. If the state measure is discriminatory, it is subjected to the "strictest scrutiny," and the burden then passes to the state to justify the measure both in terms of the local benefits flowing from the statute and the unavailability of a nondiscriminatory alternative adequate to preserve the local interests at stake (SDDS, Inc. v. State of S.D. (8th Cir.), 47 F. 3d 263, 268, 271). If "other legislative objectives are credibly advanced and there is not patent discrimination against interstate trade," the measure is subjected to a more flexible balancing test, and will be upheld unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits (Pike v. Bruce Church, 25 L. Ed. 2d 174, 178).

In that connection, the United States Supreme Court has struck down numerous attempts by states to reserve the state's market for dairy products for its local dairy farmers. In Baldwin

v. Seelig, 79 L. Ed. 1032, for example, New York law prohibited the sale in New York of milk obtained by a distributor from other states unless the distributor had paid a price that would be lawful under New York price regulations. The Supreme Court struck down this provision as an impermissible burden on interstate commerce. After observing that the New York law was aimed at keeping "the system unimpaired by competition from afar" (Id., at p. 1036), the court noted:

> "Accepting those postulates [that New York could not directly outlaw the importation of milk from Vermont purchased at below New York prices], New York [nevertheless] asserts her power to outlaw milk so introduced by prohibiting its sale thereafter if the price that has been paid for it to the farmers in Vermont is less than would be owing in like circumstances for farmers in New York. . . . Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported." (Id., at p. 1037.)

The court went on to state:

> "Nice distinctions have been made at times between direct and indirect burdens. They are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states. . . . We are reminded ... that a chief occasion of the commerce clauses was 'the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation' (citations omitted). If New York in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce

between the states to the power of the nation." (Baldwin v. Seelig, supra, at p. 1038.)

In the subsequent case of Polar Ice Cream & C. Co. v. Andrews, 11 L. Ed. 2d 389, the United States Supreme Court invalidated Florida statutes and the regulations adopted pursuant to those statutes that required a Florida milk distributor to accept its total supply of class 1 milk at a fixed price from designated milk producers in its marketing area and that permitted the distributor to turn to out-of-state sources only after exhausting the supply offered by local producers. The court stated:

> "Florida has no power 'to prohibit the introduction within her territory of milk of wholesome quality acquired [in another State], whether at high prices or at low ones,' (citation omitted); the State may not, in the sole interest of protecting the economic welfare of its dairy farmers, insulate the Florida milk industry from competition from other States." (Polar Ice Cream & C. Co. v. Andrews, supra, at p. 399.)

We think that the courts would conclude that the proposed amendments to the pooling plan impermissibly burden interstate commerce and, therefore, are violative of the Commerce Clause of the United States Constitution in two respects. First, to the extent that the amendments set a maximum price that an out-of-state producer may receive for market milk sold in this state, but would not provide for the same transportation allowances and credits an in-state producer receives for that product, the amendments, on their face, are patently discriminatory against out-of-state producers. Secondly, to the extent that the amendments set a minimum price that an out-of-state producer must receive for market milk sold in this state, the amendments are analogous to those provisions of the New York Milk Control Act found by the United States Supreme Court to violate the Commerce Clause of the United States Constitution in Baldwin v. Seelig, supra.

Therefore, it is our opinion that the amendments that are proposed to be made to the Pooling Plan for Market Milk that would restrict the price that out-of-state producers of milk could receive for that product to no more or less than the price received by in-state producers for market milk, if adopted, would violate the Commerce Clause of the United States Constitution.

Very truly yours,

Bion M. Gregory
Legislative Counsel

By /s/ Frances S. Dorbin

Frances S. Dorbin
Deputy Legislative Counsel

FSD:lmd

[A similar letter dated December 5, 1996, also appears in the appendix to the preliminary injunction memorandum but has not been reprinted here. A similar letter dated November 18, 1996, was also prepared by the Legislative Counsel but was not submitted to the courts below.]

(15) (13)

Nos. 01-950, 01-1018

Supreme Court, U.S.
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In The
Supreme Court of the United States

HILLSIDE DAIRY, *et al.*,

Petitioners,

v.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, *et al.*,

Respondents.

PONDEROSA DAIRY, *et al.*,

Petitioners,

v.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
RICHARD M. FRANK
Chief Assistant Attorney General
LINDA L. BERG
BRUCE F. REEVES
MARK J. URBAN*
Deputy Attorneys General
**Counsel of Record*
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 324-5347
Facsimile: (916) 327-2319
Counsel for Respondents

STEEFEL, LEVITT & WEISS
A Professional Corporation
ANDREA HACKETT HENNINGSEN
One Embarcadero Center
30th Floor
San Francisco, CA 94111
Telephone: (415) 788-0900
Facsimile: (415) 788-2019
A Professional Corporation

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QUESTIONS PRESENTED

1. Whether 7 U.S.C. § 7254 exempts provisions of California's milk pricing and pooling regulations from scrutiny under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3.

2. Whether the Petitioners state a claim under the Privileges and Immunities Clause, U.S. Const. Art. IV, § 2, when California's milk pricing and pooling regulations do not discriminate on their face based on state citizenship or residence.

LIST OF PARTIES

Petitioners in Case No. 01-950 are Hillside Dairy, A&A Dairy, L&S Dairy, and Milky Way Farms.

Petitioners in Case No. 01-1018 are Ponderosa Dairy, Pahrump Dairy, Rockview Dairies, Inc., and Darrel Kuiper and Diane Kuiper, d/b/a D. Kuiper Dairy.

Respondents in both cases are William J. Lyons, Jr., Secretary, Department of Food & Agriculture, State of California, and Robert Tad Bell, Undersecretary, Department of Food & Agriculture, State of California.

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STATEMENT

In *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177 (9th Cir. 1998), *cert. denied*, 525 U.S. 1105 (1999), the Court of Appeals for the Ninth Circuit unanimously held that 7 U.S.C. § 7254 (Section 7254) exempted California milk composition standards and provisions of its milk pricing and pooling laws from application of the dormant Commerce Clause. Building upon that decision, the court of appeals held that the 1997 pooling plan amendments, and other provisions of California's milk pricing and pooling laws challenged by Petitioners, were exempt from dormant Commerce Clause review. The court of appeals also upheld the district court's dismissal of Petitioners' Privileges and Immunities Clause claims. The court of appeals decision on these two issues is before the Court.[1]

A. California's Milk Laws

California has its own laws establishing the minimum prices paid by California processors for milk produced within the state and the minimum prices received by producers for that milk. California also has its own minimum standards for the composition of fluid milk sold within the state. These laws provide California consumers with an adequate and continuous supply of the most nutritious milk in the country at affordable prices.

[1] The part of the court of appeals' decision upholding dismissal of the Petitioners' Equal Protection Clause claim is not before the Court.

Both federal and California milk pricing laws were spawned during the Great Depression. The drop in commodity prices during the Depression destroyed the market stability that had previously existed. *Zuber v. Allen*, 396 U.S. 168, 173-74 (1969). Federal milk pricing laws were enacted in the face of an incipient rebellion by dairy farmers. *Queensboro Farms Products v. Wickard*, 137 F.2d 969, 974 (2d Cir. 1943). California initially attempted to participate in the federal system. The Ninth Circuit thwarted that effort when it held that the federal milk law did not cover milk that was produced and consumed within the state. *Berdie v. Kurtz*, 75 F.2d 898, 905 (9th Cir. 1935). Less than two months after that decision became final, California enacted its own milk pricing laws. 1935 Cal. Stat., ch. 241, at 922-29, §§ 735-737.9 (current version at California Food & Agric. Code §§ 61801-62403).

Under these laws, the California Department of Food and Agriculture (Department) establishes minimum prices to be paid for milk produced and processed within California, based on the type of product processed from the milk. The Class 1 price, which covers processed fluid milk, is typically the highest minimum price. Raw milk processed into butter (Class 4a) or cheese (Class 4b) typically has the lowest minimum price. California law does not prohibit processors from paying producers more than the minimum price. Nor does California law mandate any minimum prices for milk produced outside of California.

California courts have repeatedly stated that the primary purpose of the milk pricing laws is to provide "an adequate and continuous supply of pure, fresh, wholesome fluid milk to the consumers at fair and reasonable prices." *Golden Cheese Co. v. Voss*, 230 Cal. App. 3d 547, 553 (1991). Thus, the milk pricing laws "primarily protect the

consumer, not milk producers, by protecting the quality and quantity of the milk they drink." *Id.* at 562. These judicial pronouncements are consistent with the legislative declaration that economic disruption from the absence of pricing regulation "may tend to undermine sanitary regulations and standards of content and purity" for fluid milk, Cal. Food & Agric. Code § 61802(c) (West 1997), and consistent with the factors that the Department must consider in setting minimum milk prices. Cal. Food & Agric. Code § 62062(b).

Raw milk is composed of fat, solids-not-fat, and water.[2] In 1947, California first adopted a comprehensive set of minimum composition standards for fluid milk, which specified minimum percentages of fat and solids-not-fat, and other dairy products. 1947 Cal. Stats, Ch. 939, at 2168, § 460. In 1961, the California Legislature enacted a minimum composition standard for two-percent milk (now called "reduced fat" and set forth in California Food and Agricultural Code section 38211) that could consistently be satisfied only through "fortification," the addition of solids-not-fat to the milk as it is being processed. 1961 Cal. Stats., Ch. 2126, at 4386, § 626.1. Later, a minimum standard for one-percent milk was added, which could also require fortification. Cal. Food & Agric. Code § 38191. Less stringent federal standards for these products, which apply in the rest of the United States, can ordinarily be satisfied without fortification.

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[2] Solids-not-fat are milk solids, other than fat, that include protein, calcium, lactose and other nutrients.

The adoption of composition standards that required milk fortification had a direct effect on the milk pricing laws. Prior to 1961, minimum milk prices were not separately set for fat and solids-not-fat. Fortification established, for the first time, an economic value for the level of solids-not-fat in raw milk. As a consequence, the Legislature required that the new two-percent milk composition standard could not take effect until minimum Class 1 prices had a separate solids-not-fat basis component. 1961 Cal. Stats., Ch. 2126, at 4386, § 626.1. In 1963, component Class 1 pricing and the two-percent milk standard became permanent, and a higher solids-not-fat standard for whole milk, which also required fortification, was adopted. 1963 Cal. Stats., Ch. 469, at 1322-25, §§ 460, 626.1, 4231, 4283.

Composition standards requiring fortification were not the only significant change in California milk laws in the 1960s. California law originally provided that producers would receive a minimum price for milk based on its end use. Raw milk sold to fluid milk (Class 1) processors received the higher Class 1 minimum price; milk sold to manufacture cheese (Class 4) received the lower Class 4 minimum price. Thus, a milk producer's revenues were directly related to the amount of milk that was sold for Class 1 usage. Steven E. Hopkinson, Comment, *State Regulation of Milk Producer Pricing and Sales in California*, 11 U.C. Davis L. Rev. 491, 494 (1978).

This system proved unworkable. There was fierce competition among processors for the more lucrative Class 1 contracts, which led to numerous abuses that undercut the minimum pricing system. *Id.* Some Class 1 processors began acquiring their own dairy herds, which reduced their need to purchase milk from independent producers and provided these processors with a competitive advantage over

other processors. *Hillside* Dkt. No. 151, Ex. A to Lombardo Decl., L.J. Butler, *Maintaining the Competitive Edge in California's Dairy Industry, Part I-Organization and Structure* (Butler), at 29. The Gonsalves Milk Pooling Act, Cal. Food & Agric. Code §§ 62700-62731, was enacted in 1967 to avoid these problems and preserve the viability of the minimum pricing system.

Under the pooling system, the minimum price that producers receive is either a higher quota price or a lower overbase price.[3] The amount of quota was originally set at 110% of a producer's sales to Class 1 plants at the time of the adoption of the Gonsalves Milk Pooling Act. *Butler, supra*, at 29. The establishment of quota on this basis ensured that producers who had contracts for the sale of raw milk to Class 1 plants would not suffer economic harm from implementation of pooling. The amount of quota milk is still restricted, currently accounting for approximately 27% of total California milk production. State of California Department of Food and Agriculture, Milk Pooling Branch Report 120-17 at 41 (Jan. 24, 2003) (attached as App. B to Brief for United Western Dairymen as Amicus Curiae). Thus, most California milk receives the overbase price.

California has an elaborate accounting system for integrating the minimum prices that processors are required to pay for milk, and the minimum prices that producers are entitled to receive for milk. Each month, a

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[3] The difference between the quota and overbase price is fixed; the spread is currently calculated to be $1.70 per hundredweight for milk containing 8.7% solids-not-fat. *Pooling Plan for Market Milk As Amended* (July 1, 1997) § 906, Joint Appendix 52-53; *see also* <http://www.cdfa.ca.gov/mkt/mp/poolplan_09-01.pdf> (current version).

processor is charged an "in-plant blend price" based on the percentage and minimum price of each end use to which the milk was processed. The in-plant blend price is multiplied by the total volume of raw milk processed to yield the processor's "gross pool obligation." Cal. Food & Agric. Code § 62079; *Pooling Plan for Market Milk As Amended* (July 1, 1997) (Pooling Plan) §§ 900-901, Joint Appendix (J.A.) 46-48; *see also* <http://www.cdfa.ca.gov/mkt/mp/poolplan_09-01.pdf> (current version).

Processors must pay their California producers at least the minimum quota or overbase prices. The processors receive a credit against their gross pool obligation equal to their total required minimum payments to California producers. If a processor's gross pool obligation exceeds the credit, as typically occurs with Class 1 processors, the processor pays the difference into the pool. If the gross pool obligation is less than the credit, as typically occurs with cheese processors, the processor receives a payment from the pool. Each month, total payments into the pool balance payments out of the pool. Pooling Plan §§ 1000-1004, J.A. 55-60.

California does not restrict processors from purchasing milk from outside the state. Nonetheless, the receipt of that milk is accounted for in calculating a processor's pool obligations. Before 1997, the pool obligation credit that California processors received for out-of-state milk was calculated by multiplying the total volume of such milk by the in-plant blend price. A change in this accounting procedure spawned this litigation.

B. This Litigation

As long as the quota price and Class 1 price were roughly equivalent, the use of the in-plant blend price to calculate the pool credit for out-of-state milk did not create any economic or fairness concerns. In the mid-1990s, however, Class 1 prices were significantly greater than quota prices. Court of Appeals, Excerpts of Record (C.A. E.R.) Tab 11Q at 9. This price disparity provided California processors with a significantly larger accounting credit against their pool obligations for out-of-state milk (the Class 1 price) than they received from purchasing in-state milk (the quota or overbase price). Moreover, if the actual price of the out-of-state milk was less than the processors' in-plant blend price, the processor could retain the price difference and still pay the out-of-state producer more than the quota price. Thus, the pool accounting for out-of-state milk put California producers at a significant, artificial disadvantage in relation to out-of-state producers.

The development of a practice called "roundtripping" was the most economically inefficient result of the method used to account for out-of-state milk. Some California producers and cooperatives would ship their California overbase milk to out-of-state processing plants. They would then ship the same amount of milk to California fluid milk processors from out-of-state dairies and receive the higher California Class 1 price. Court of Appeals, Supplemental Excerpts of Record (C.A. S.E.R.) Tabs 2C, 2I. This price was much higher than the overbase price that they would have received if they had sold their California production directly to California processors. C.A. E.R. Tab 11Q at 47-49; C.A. S.E.R. Tabs 2C, 2I. For example, one California cooperative generated $100,000

per month in additional revenues through roundtripping. C.A. S.E.R. Tab 2I. Some dairy farmers even opened new dairies out-of-state, in addition to their in-state dairies, to take advantage of this accounting method. C.A. S.E.R. Tab 2B.

In September 1996, California milk producers submitted a petition to the Department proposing changes to the milk pooling plan to eliminate the incentive to purchase out-of-state milk. The Department held extensive hearings on this and other proposals offered by organizations representing California milk processors and out-of-state milk producers. Based on those hearings, the Department determined that its accounting method for out-of-state milk "ha[d] caused dramatic increases in the inefficient movement of milk and ha[d] altered the sound, orderly marketing practices of milk, all as a result of regulatory provisions and not competitive market conditions." C.A. E.R. Tab 11Q at 48. The Department modified the California producers' proposal and adopted the pooling plan amendments that are the subject of this case. In taking this action, the Department determined that the amendments were "the best, most equitable and least restrictive means reasonably available to treat in-state and out-of-state milk evenhandedly for purposes of pool accounting. . . ." *Id.* at 50-51.

The amendments provide that California processors must use the lesser of the in-plant blend price, or the quota price in calculating their credit for out-of-state milk. Under typical market conditions, the in-plant blend price for Class 1 processors exceeds the quota price, so the quota price would be used to calculate their credit for out-of-state milk. The pooling plan amendments also provide that the credit price for out-of-state milk would never be lower than the overbase

price. Pooling Plan § 900(d), J.A. 47-48. Thus, the credit price for out-of-state milk is at least equal to, and usually greater than, the credit price for in-state milk.

The pooling plan amendments do not establish any minimum price that a California processor is required to pay for out-of-state milk. Thus, a more efficient out-of-state producer is able to compete successfully against a less efficient California producer. In addition, since the credit for out-of-state milk is based on the quota price, a California Class 1 processor suffers no economic loss for payments for out-of-state milk up to that price. In adopting the 1997 pooling plan amendments, the Department described its objective: "Competitive market conditions should determine the movement of milk, not inappropriate regulatory pool provisions which otherwise distort the economic signals of the marketplace."[4] C.A. E.R. Tab 11Q at 49.

Northern Nevada dairies (Petitioner Hillside Dairy, et al.) and southern Nevada and Arizona dairies (Ponderosa Dairy, et al.) filed a lawsuit in the United States District Court for the Eastern District of California primarily seeking to prevent the 1997 pooling plan amendments from taking effect. They moved for a preliminary injunction, largely based on their contention that the amendments violated the Commerce Clause. The district court denied the

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[4] The Petitioners and Amici have claimed that the Department's intent was "economic protectionism" for California milk producers. If that had been the intent, which it was not, the Department utterly failed. Use of out-of-state milk in California has doubled since the adoption of the 1997 pooling plan amendments. C.A. S.E.R. Tab 2N; California Department of Food and Agriculture, *Net Milk Available in California*, California Dairy Information Bulletin (Feb. 2003), at 10, Table 4B <http://www.cdfa.ca.gov/dairy/pubs/DIB/dib.pdf>.

motion to enjoin the amendments, stating that the Petitioners had "fail[ed] to carry their burden of demonstrating that they will prevail on the merits of their Commerce Clause challenge to the pooling amendments." C.A. E.R. Tab 6 at 6:17-18; *see also* C.A. E.R. Tab 7 at 2:1-4, 2:21-3:23.[5]

The district court responded directly to Petitioners' claims that the pooling plan amendments were unfair to out-of-state producers:

> Plaintiffs also argue the amendment violates the Commerce Clause because it was enacted with the intent of reducing the amount of out-of-state milk purchased by California processors. However, they cite no authority for the proposition that the Commerce Clause prevents a state from remedying a regulatory advantage to out-of-state producers. "A fair reading of the [regulatory history] indicates no more than that the [amendment] was aimed at protecting [California's] milk industry from itself, not from outside competition."

C.A. E.R. Tab 6 at 5:22-6:5.[6]

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[5] Although it is not an issue before this Court, Petitioners deal at length with their underlying Commerce Clause claim. Brief for Petitioners 34-42. To support that argument, they append a California Legislative Counsel's opinion to their brief. This opinion was based on the incorrect assumptions that California's minimum prices are applied to out-of-state milk, and that out-of-state milk was used to fund transportation allowances for in-state milk production. C.A. E.R. Tab 11Q at 50. The district court considered and rejected the Legislative Counsel's opinion and the Petitioners' dormant Commerce Clause claim in ruling upon the Petitioners' preliminary injunction motion.

[6] The district court's decision enjoined enforcement of California Food and Agricultural Code sections 62077 and 62078 against out-of-state producers. C.A. E.R. Tab 7 at 5. California has not interpreted these

(Continued on following page)

In July 1998, the district court granted Respondents' motion to dismiss certain causes of action under Rule 12(b)(6), including claims under the Equal Protection Clause and the Privileges and Immunities Clause. In 1999, the district court granted Respondents' motion for summary judgment on the remaining dormant Commerce Clause claims. The district court relied upon the holding in *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177 (9th Cir. 1998) that 7 U.S.C. § 7254 exempted California's milk pricing and pooling laws from application of the dormant Commerce Clause. On appeal, the court of appeals upheld the district court's determinations on these issues.

SUMMARY OF ARGUMENT

The first question before the Court is whether 7 U.S.C. § 7254 exempts provisions of California's milk pricing and pooling regulations from scrutiny under the dormant Commerce Clause. Clear congressional intent, rather than any prescribed set of words, is required for the creation of an exemption from dormant Commerce Clause scrutiny. Drawing upon cases involving congressional limits on state sovereignty, Petitioners argue that the congressional intent must be both unequivocal and textual. Principles of federalism support a more state-deferential standard for determining the existence and scope of a dormant Commerce Clause exemption.

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provisions as setting minimum prices outside of California. C.A. E.R. Tab 7 at 5 n.4.

Petitioners imply that Section 7254 only protects California milk laws from federal preemption. But the broad text of Section 7254 covers more than preemption. It also covers any provision of law that "preempt[s], prohibit[s] or otherwise limit[s] the authority of the State of California . . . regarding" milk content and labeling. 7 U.S.C. § 7254. Its sweeping language is similar in breadth and specificity to the language of other laws that have been found to create a dormant Commerce Clause exemption.

The legislative history of Section 7254 also shows an unambiguous intent to exempt California milk laws from the dormant Commerce Clause. In enacting Section 7254, Congress allowed California to regulate the content of milk in interstate commerce so that California could fully enforce its fluid milk standards. Without a Commerce Clause exemption, that intent could be frustrated.

Once it has been determined that Section 7254 provides an exemption from the dormant Commerce Clause, it is necessary to determine the scope of that exemption. Section 7254 expressly protects California's authority "directly or indirectly to establish or continue to effect any law, regulation or requirement regarding" fluid milk content and labeling. Based on this language, provisions of the milk pricing and pooling laws that relate to fluid milk content are exempt from dormant Commerce Clause review.

California pricing and pooling laws have a close historical, economic, and legal connection to fluid milk composition. When California first required fortification of fluid milk (the most significant difference from federal composition requirements), it had to change its pricing

system for milk processed into fluid milk. California's ability to control raw milk costs through minimum prices helps ensure that consumers receive the benefits of California's higher milk composition standards at reasonable costs. California courts and the legislature have long recognized that the primary purpose of the milk pricing laws is to provide an adequate supply of wholesome fluid milk to consumers at a fair price.

California's milk pooling laws are an essential part of the milk pricing system. Legislative declarations that accompanied the original adoption of the milk pooling laws recognized the relationship among pooling, pricing and milk content. The 1997 pooling plan amendments at issue in this case were necessary to remedy abuses that were undermining the efficient operation of the pricing and pooling system. With these amendments, California's milk pricing and pooling laws continue to ensure an adequate supply of fluid milk that satisfies state content standards.

An exemption from dormant Commerce Clause review for pricing and pooling laws will not result in the unfair regulation of out-of-state milk producers. Congress retains its Commerce Clause power to eliminate the exemption in Section 7254 if necessary to end any abusive action by California. In addition, the competing economic interests of California producers and California processors help ensure that California's milk pricing and pooling laws will not be unfair to out-of-state producers.

The second question before the Court is whether a claim can be stated under the Privileges and Immunities Clause when the laws in question do not discriminate on their face based on state citizenship or residence. It is well established that the Privileges and Immunities Clause is

violated only if a state law discriminates against nonresidents, depriving them of a protected privilege that is accorded to residents. Recognizing that the California milk pooling laws do not discriminate based on residency, Petitioners argue that the Court should use a "practical effects" test derived from dormant Commerce Clause cases as part of its Privileges and Immunities Clause analysis. This argument depends heavily upon an infrequently cited 1919 decision, *Chalker v. Birmingham & N.W. Ry.*, 249 U.S. 522 (1919). Contrary to Petitioners' position, *Chalker* has never given rise to a "practical effects" test under the Privileges and Immunities Clause. The Commerce and Privileges and Immunities Clauses also have different objectives and set different standards for state conduct. Use of the same test for both Clauses is improper.

The Solicitor General suggests that the Court might consider drawing upon its Equal Protection Clause decisions to find that a facially neutral state law that has a discriminatory intent could violate the Privileges and Immunities Clause. Many of the laws challenged under the Equal Protection Clause are facially neutral, and the invidious nature of the law, as applied to a suspect classification, is only apparent through its effect. The Privileges and Immunities Clause does not address laws that have a disparate effect on nonresidents. Adoption of the Solicitor General's suggestion would improperly require a stringent Equal Protection Clause review indirectly through the Privilege and Immunities Clause. In any event, the state pooling laws at issue in this case do not have a discriminatory intent.

ARGUMENT

I. SECTION 7254 EXEMPTS CALIFORNIA LAWS AND REGULATIONS REGARDING FLUID MILK CONTENT FROM APPLICATION OF THE DORMANT COMMERCE CLAUSE

Shamrock Farms Co. v. Veneman, 146 F.3d 1177 (9th Cir. 1998), *cert. denied*, 525 U.S. 1105 (1999), held that 7 U.S.C. § 7254 exempted California milk composition standards and provisions of its milk pricing and pooling laws from application of the dormant Commerce Clause. Not only are Petitioners challenging the extension of that holding to the 1997 pooling plan amendments at issue in this case, they argue that Section 7254 does not provide a Commerce Clause exemption for any California law. This argument is contrary to previous holdings of the Court regarding congressional intent to exempt state laws from the dormant Commerce Clause. It is also contrary to the wording of Section 7254 and the clear congressional intent that California have its own laws regarding the content of fluid milk.

Article I, Section 8, of the Constitution grants Congress the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The Court has long held that "while a literal reading evinces a grant of power to Congress, the Commerce Clause also directly limits the power of the States to discriminate against interstate commerce." *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992). This implied judicial limitation on the power of States has come to be known as "the dormant Commerce Clause."

Under the Commerce Clause, "Congress has undoubted power to redefine the distribution of power over

interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible, or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce." *Southern Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945) (citations omitted). State actions that Congress has plainly authorized are invulnerable to dormant Commerce Clause challenge. *Northeast Bancorp, Inc. v. Board of Governors, FRS*, 472 U.S. 159, 174 (1985).

A. Clear Congressional Intent is Needed To Create an Exemption from the Dormant Commerce Clause

In determining that Section 7254 provided a dormant Commerce Clause exemption, the court of appeals stated that such congressional action must be "unmistakably clear." *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177, 1180 (9th Cir. 1998). This phrase, which was originally used in the dormant Commerce Clause context in *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984), is one of several similar phrases that the Court has used in deciding whether Congress has exempted state action from dormant Commerce Clause review. In *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982), the Court stated that the "Congressional intent and policy . . . must be expressly stated." *Maine v. Taylor*, 477 U.S. 131, 139 (1986) required "an unambiguous indication of Congressional intent." The basic thrust of each of these statements is clear congressional intent, not the use of any particular "talismanic" form of words. *South-Central Timber*, 467 U.S. at 91.

In contrast, Petitioners want a more stringent standard. They claim that there must be a "clear statement"

that is "both unequivocal and textual" for a congressional dormant Commerce Clause exemption. Brief for Petitioners (Pet. Br.) at 15-16, 25. They derive this standard from a line of decisions involving state sovereignty, primarily *Dellmuth v. Muth*, 491 U.S. 223 (1989) and *Gregory v. Ashcroft*, 501 U.S. 452 (1991), that have never been applied to a dormant Commerce Clause exemption.

In *Dellmuth*, the issue was whether Congress, in enacting the Education of the Handicapped Act, intended to abrogate state sovereign immunity under the Eleventh Amendment. As the Court pointed out, abrogation of sovereign immunity upsets the balance between the Federal Government and the States, and strains basic principles of federalism. In that context, a clear statement of congressional intent in the text of the statute is required. *Dellmuth*, 491 U.S. at 227-28. Similar concerns about state sovereignty in the federalist system in the context of congressional action under the Supremacy Clause led to the use of a "clear statement" standard in *Gregory*, 501 U.S. at 460-61.

The *Dellmuth* and *Gregory* decisions are part of a larger recognition by the Court of the importance of state sovereignty in the federalist system. In *Printz v. United States*, 521 U.S. 898 (1997), the Court held that the federal government could not compel states to implement federal regulatory programs. The court stated: "It is incontestable that the Constitution established a system of 'dual sovereignty.' Although States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.'" *Id.* at 918-19 (citations omitted). Similar federalism concerns have led the Court to limit the scope of congressional Commerce Clause powers. *United States v. Morrison*, 529 U.S. 598, 607-08 (2000).

These same principles of federalism and state sovereignty suggest a more state-deferential standard for determining the existence and scope of a congressional exemption from dormant Commerce Clause review. The dormant Commerce Clause is a limitation on a state's exercise of its sovereignty and tends to undermine the balance struck in the federalist system. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 611-12 (1997) (Thomas, J., dissenting). When a federal court invalidates a state law under the dormant Commerce Clause, a principal advantage of federalism, state experimentation in a subject area, may be lost. Martin Redish & Shane Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 Duke L.J. 569, 598.

Congress retains the power under the Commerce Clause to correct any perceived abuse of state sovereignty. An appropriate reconciliation of Congress's Commerce Clause powers, the dormant Commerce Clause, and state sovereignty may be to construe any lack of clarity in a congressional dormant Commerce Clause exemption in deference to the preservation of state law and authority.

B. The Text of Section 7254 Shows an Unambiguous Intent to Exempt California's Milk Laws from the Dormant Commerce Clause

Section 7254 states:

> Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding

(1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or

(2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

Petitioners and the Solicitor General assert that the use of the phrase "shall be construed" suggests Section 7254 only refers to non-constitutional sources of federal law. Pet. Br. 24-25; Brief for United States as Amicus Curiae (U.S. Br.) 13.[7] The Solicitor General also argues that if Congress intended a Commerce Clause exemption it should "have referred more specifically to that Clause." U.S. Br. 13-14. The Solicitor General supports this claim with examples of federal laws, unrelated to the dormant Commerce Clause or State authority, that use both the word "Constitution" and the words "laws of the United States." *Id.* at 12 n.3. Implicit in these arguments is that Section 7254 only protects California's laws regarding milk composition and labeling from federal preemption.

The text of Section 7254 expressly refers to preemption. But it also states that no law "shall be construed to . . . *prohibit, or otherwise limit* the authority of the State of California. . . ." 7 U.S.C. § 7254 (emphasis added). The Petitioners and Solicitor General ignore this broad language,

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[7] The Solicitor General cites *City of Boerne v. Flores*, 521 U.S. 507 (1997) and implies that Congress, if it intended Section 7254 to be a dormant Commerce Clause exemption, might be improperly constraining judicial authority to "construe the Constitution." U.S. Br. 13. It is well established, however, that Congress, not the courts, have primacy in implementing the Commerce Clause. "Courts are final arbiters under the Commerce Clause only when Congress has not acted." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154-55 (1982).

and thereby treat it as surplusage. In contrast, the Ninth Circuit in *Shamrock Farms Co.* properly understood its significance:

> We note also that the protection the Farm Bill [Section 7254] affords California's milk standards is sweeping. It does not simply bar preemption. Rather, it states that no provision of law shall "preempt, prohibit, or otherwise limit" California's milk laws or regulations. The breadth of the Farm Bill's protection for California's milk standards fortifies our view that by using the term "any other provision of law," Congress intended to preserve those standards from any sort of challenge, including one based on Commerce Clause grounds.

Shamrock Farms Co. v. Veneman, 146 F.3d 1177, 1181 (9th Cir. 1998).

The language of Section 7254 is similar in breadth or specificity to the language of the statutes and regulations that have previously been relied upon by the Court in finding a dormant Commerce Clause exemption. *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946), *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 653 (1981) (McCarran-Ferguson Act and insurance industry); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 213-15 (1983) (Housing and Urban Development Act and municipal order requiring use of local workers); *Northeast Bancorp v. Board of Governors, FRS*, 472 U.S. 159, 174 (1985) (Bank Holding Company Act and

interstate acquisitions of banks).[8] Significantly, none of those statutes and regulations explicitly references either the Commerce Clause or the Constitution. Rather, the language at issue in each of those cases variously authorized the state to engage in regulatory conduct affecting interstate commerce. Similarly, the language of Section 7254 allows California, without prohibition or limitation, to enact laws regarding the content and labeling of fluid milk.

C. The Legislative History of Section 7254 Also Shows an Unambiguous Intent to Exempt California's Milk Laws from the Dormant Commerce Clause

The legislative history of Section 7254 further demonstrates that Congress intended to allow California to enforce laws regarding milk content even if those laws affect interstate commerce. Simply stated, it would have been pointless for Congress to have enacted Section 7254 without including a dormant Commerce Clause exemption.

When Section 7254 was adopted, the federal Nutrition Labeling and Education Act of 1990 (NLEA) Pub. L. No. 101-535, 104 Stat. 2353, prohibited a state from having

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[8] The Court in *White* primarily relied on the market participant exception to the dormant Commerce Clause to uphold the Mayor's order requiring use of the local work force in public improvement projects. *White*, 460 U.S. at 214-15. The Court indicated that projects paid for with a mix of federal and local funds were "affirmatively sanctioned" by the federal government by virtue of federal regulations which, like the mayoral order, imposed local-workforce requirements. *White*, 460 U.S. at 215.

any composition or labeling standard for any food, including fluid milk, in interstate commerce that was not identical with any existing federal standard for the same product. 21 U.S.C. § 343-1(a)(1)-343-1(a)(2). This prohibition did not apply to intrastate products. NLEA, 58 Fed. Reg. 2462 (Jan. 6, 1993). Thus, NLEA only preempted California's more stringent standards for fluid milk that was processed outside of California. Most fluid milk sold at retail in California is processed within the state, and had to satisfy the California standards.

Section 7254 was Congress's response to NLEA. Having initially exercised its Commerce Clause power to limit the authority of California to affect interstate commerce, Congress acted to allow California, directly or indirectly, to regulate fluid milk content and labeling in interstate commerce. A dormant Commerce Clause challenge to California laws regarding fluid milk content would be fundamentally inconsistent with congressional authorization of these laws.

The House Conference Committee Report that accompanied adoption of Section 7254 unambiguously states Congress's intent:

> The Managers intend for the State of California to be able to fully enforce and apply its fluid milk standards and their attendant labeling requirements to all fluid milk sold at retail or marketed in the State of California. . . .

H.R. Conf. Rep. No. 104-494, at 338-39 (1996), *reprinted in* 1996 U.S.C.C.A.N. 683, 701. Petitioners' brief contains similar statements from individual members of Congress describing their interest in allowing "California to keep its existing standards if they see fit to do so." Pet. Br. 32

(Representative Solomon); *id.* (Representative Thomas); *id.* at 28-29 (Representative Thomas).

Congress thus intended that California's standards apply fully to fluid milk sold in California regardless of its source. Less stringent federal standards would apply in the rest of the United States. This comprehensive regulatory system, adopted under Congress's Commerce Clause powers, would be undermined if California's laws regarding milk composition were subject to dormant Commerce Clause challenge. The only reasonable reading, then, of Section 7254 is one that includes an exemption from dormant Commerce Clause scrutiny.

II. THE PROVISIONS OF THE CALIFORNIA MILK PRICING AND POOLING LAWS INVOLVED IN THIS CASE ARE WITHIN THE SCOPE OF SECTION 7254

A. Section 7254 is Broadly Worded to Exempt All Laws Relating to Milk Content from Dormant Commerce Clause Challenge

Having determined that Section 7254 provides an exemption from dormant Commerce Clause review, it is necessary to determine the scope of that exemption. Section 7254 indisputably covers the specific sections of the California Food and Agricultural Code that set minimum fat and solids-not-fat content requirements for fluid milk products sold or marketed in California and that require labeling in conformity with those standards. The statutory language of Section 7254 determines the extent to which the dormant Commerce Clause exemption extends beyond those provisions. As discussed above, the

Court, in interpreting that language, should give due deference to the preservation of state law and authority.

The language in Section 7254 is very broad. It expressly protects California's authority, "directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding" fluid milk product content and labeling. Section 7254 covers not only laws that existed when that section was adopted, but new laws as well, whether established directly or indirectly. Indeed, the phrase "directly or indirectly" in Section 7254 is so general that it alone could be interpreted to cover all of California's milk regulatory programs.

The only possible limitation to the scope of Section 7254 is that the laws and regulations must regard or relate to fluid milk composition or labeling. In considering this limitation, the Court should accord significant weight to California's own determination of what law supports its unique fluid milk content standards. In this case, the history of their enactment, basic economic principles and California judicial and legislative pronouncements all show a close connection between milk pricing and pooling laws and fluid milk content, which brings the provisions of these laws within the scope of Section 7254.

B. Because of Their Relationship to Fluid Milk Content, Provisions of California Milk Pricing and Pooling Laws Are Laws Regarding the Content and Labeling of Fluid Milk

1. The Historic Relationship Between Milk Pricing and Fluid Milk Content

The most significant change in California's milk composition standards, the fortification of fluid milk,

resulted in a significant change in California's milk pricing system. When California first required fortification in 1961, there were no separate minimum milk prices for solids-not-fat. The fortification requirement established an economic value for the level of solids-not-fat in raw milk that had not previously existed. As a consequence, the California Legislature required that the new two-percent (low-fat, now reduced-fat) milk composition standard could not take effect until minimum Class 1 prices included a separate solids-not-fat basis component. 1961 Cal. Stats., Ch. 2126 at 4386, § 626.1. In 1963, component Class 1 pricing and the two-percent milk standard became permanent and a higher solids-not-fat standard for whole milk was adopted. 1963 Cal.Stats., Ch. 469 at 1322-25, §§ 460, 626.1, 4231, 4283.

In the mid-1980s, the federal government considered whether to adopt California's milk composition standards on a nationwide basis. At that time, federal milk pricing orders did not include a separate Class 1 price for solids-not-fat. Economic Research Service, USDA, *Nationwide Adoption of the California Solids Standards for Fluid Milk Products*, Staff Rep. No. AGES840816 at 18 (Aug. 1984). A report issued by the United States Department of Agriculture indicated that adoption of the California standards would probably also necessitate the adoption of component pricing in federal milk orders. *Id.* at 18-20. Such component pricing would be needed to equalize raw product costs among fluid milk processors who receive milk with differing solids-not-fat content. *Id.* at 18-19.

2. The Economic Relationship Between Milk Pricing and Fluid Milk Content

Basic economic principles also connect California's pricing and pooling laws to perpetuation of the milk composition standards. California milk composition standards result in fluid milk products that have more nutrients than federal standard milk. The addition to fluid milk of solids-not-fat, which provides these nutrients, increases processor costs, which are usually passed on to consumers. Increases in raw product costs through higher Class 1 minimum prices may also be borne by consumers. At some point, the increased cost of fluid milk will reduce the amount of milk consumed, and the nutritional benefit of higher standards will be undercut. If California cannot control raw product costs through minimum Class 1 prices, it will be unable to ensure that consumers receive the benefits of California's higher milk composition requirements at reasonable prices.

The threat to the composition standards from rising prices is not just theoretical. In the late 1990s, California retail milk prices were reportedly among the highest in the country. A serious, and ultimately unsuccessful, effort was made to allow the sale of federal standard milk in California as a remedy to high milk prices. Geoffrey Adalian, *Solving California's Milk Crisis*, 11 San Joaquin Agric. L. Rev. 87 (2001). If that effort had been successful, it would have effectively eliminated California's more stringent standards.

3. Judicial and Legislative Declarations of the Relationship Between Milk Pricing and Fluid Milk Content

The California courts and Legislature have also recognized the connection between milk pricing and milk composition. According to the courts, the primary purpose of the milk pricing laws is to provide "an adequate and continuous supply of pure, fresh, wholesome fluid milk to the consumers at fair and reasonable prices." *Golden Cheese Co. v. Voss*, 230 Cal. App. 3d 547, 553 (1991). The California Legislature has declared that economic disruption caused by the lack of pricing regulation "may tend to undermine sanitary regulations and standards of content and purity" for fluid milk. Cal. Food & Agric. Code § 61802(c). In setting minimum milk prices, the California Department of Food and Agriculture must consider whether those prices will "insure an adequate and continuous supply, in relation to demand, of pure, fresh, wholesome market milk . . . at prices to consumers which . . . are fair and reasonable." Cal. Food & Agric. Code § 62062(b).

Thus, well before the enactment of Section 7254, the California Legislature recognized the connection between price regulation and the content of fluid milk. The Court has long accepted the validity of such state legislative declarations in determining the purpose of state law. *Pacific Gas & Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190, 216 (1983).

4. California Pooling Laws and California Pricing Laws Are Integrally Related

California's milk pooling laws are an essential part of the milk pricing system. In the 1960s, the income of

producers who delivered to Class 1 plants greatly exceeded the income of similarly situated producers who shipped to plants that did not have high Class 1 utilization. *Hillside* Dkt. No. 151, Ex. A to Lombardo Decl., L.J. Butler, *Maintaining the Competitive Edge in California's Dairy Industry, Part I – Organization and Structure*, at 29. Processors began to acquire their own dairy herds and use the milk in their own Class 1 plants, which lowered their costs and displaced independent producers from Class 1 usage. *Id.* Processors also engaged in a variety of questionable practices that had the effect of undercutting the minimum price received by producers. *Id.* at 28. By removing the economic incentive to sell to Class 1 processors, California's pooling laws eliminated these abuses and allowed the minimum price system to function more efficiently.

Legislative declarations that accompanied enactment of the Gonsalves Milk Pooling Act show the relationship among pooling, pricing and milk content. In 1967, the California Legislature declared that "fluid milk and fluid cream are necessary articles of food for human consumption," that "the production and maintenance of an adequate supply of healthful milk of proper chemical and physical content . . . is vital to public health and welfare," and that "unfair, unjust, destructive and demoralizing trade practices have appeared within this industry and these practices constitute a menace to the health and welfare of the inhabitants of this state by threatening the stability of this industry and by thereby endangering the assurance to the people of the State of California of the maintenance of an adequate supply of this necessary commodity. . . ." Cal. Food & Agric. Code § 62701.

These legislative declarations are similar to the declarations of legislative purpose for California's milk

pricing laws. Cal. Food & Agric. Code § 61802(b). As with these declarations, the declarations in the milk pooling laws connect the need for a milk pooling system with the need for "an adequate supply of healthful milk of proper chemical and physical content." Cal. Food & Agric. Code § 62701.

5. The 1997 Amendments to the California Pooling Plan

The California milk pooling system is a complex, integrated system. Its accounting procedures match the minimum prices (based on end use) that California processors are required to pay for milk, and the minimum prices (quota or overbase) that California producers are entitled to receive for milk. These procedures are designed to ensure the efficient operation of California's minimum milk pricing laws, especially Class 1 pricing.

As with any complex system, California's pooling laws require periodic adjustments to maintain their continued effectiveness in ensuring adequate supplies of fluid milk. The California pooling laws, as initially adopted, removed the economic incentive for producers to send their milk to Class 1 plants. The Department has, at various times, amended the pooling plan to include measures such as transportation allowances which ensure that adequate milk supplies will be shipped to Class 1 fluid milk processors. C.A. E.R. Tab 11Q at 11-12.

The 1997 pooling plan amendments at issue in this case are another necessary adjustment to the pooling plan. The pooling plan accounts for the purchase of out-of-state milk in determining a processor's pool obligations. In the mid-1990s, Class 1 prices were significantly greater than quota prices; and California's Class 1 prices were higher

than the equivalent minimum prices in neighboring states. *Id.* at 47-49, A-9. Under the then-existing accounting system, the disparity between the quota price and Class 1 price created strong economic incentives for California Class 1 processors to purchase out-of-state milk. Both price disparities led to the abusive practice known as "roundtripping," in which California-produced raw milk was shipped to Arizona and Nevada processors and an identical amount of raw milk produced in those states was shipped to California processors. C.A. S.E.R. Tabs 2C, 2I. The Chief Executive Officer of the Hillside Plaintiff's cooperative conceded that roundtripping was "patently threatening the California pooling system." C.A. S.E.R. Tab 2J at 168:23-25.

In 1997, the Department determined, after extensive public hearings, that the existing accounting method for out-of-state milk "ha[d] caused dramatic increases in the inefficient movement of milk and has altered the sound, orderly marketing practices of milk, all as a result of regulatory provisions and not competitive market conditions." C.A. E.R. Tab 11Q at 48. Selecting the most equitable and least restrictive approach available, the Department amended the pooling plan to require that Class 1 processors account for out-of-state milk in a typical month at the quota price, the highest minimum price available to California producers. Pooling Plan § 900(d). J.A. 47-48. This corrective measure was necessary to ensure the continued, efficient operation of California milk pricing and pooling laws. As the California Legislature has recognized, those laws ensure an adequate supply of fluid milk that satisfies state standards of content. Cal. Food & Agric. Code §§ 61802(c), 62701.

C. Even with a Dormant Commerce Clause Exemption, California is Constrained from Improperly Using Its Milk Pricing and Pooling Laws to the Detriment of Out-of-State Producers

An exemption from dormant Commerce Clause review for provisions of its milk pricing and pooling laws will not result in California applying those laws in a manner that is unfair to out-of-state milk producers. Congress retains its Commerce Clause power to eliminate the exemption in Section 7254 and end any abusive action by California.

Milk regulation, including California's milk pricing laws, is an area of active congressional involvement. In the 1990 Farm Bill, for example, Congress enacted section 102, which directed California and other states in setting the manufacturing allowance, a variable used in calculating minimum prices for milk processed into cheese, nonfat powdered milk, and butter. 7 U.S.C. § 1446e-1 (repealed 1996); Food, Agriculture, Conservation and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359. Section 7255 of the 1996 Farm Bill modified this provision by specifying a maximum manufacturing allowance. 7 U.S.C. § 7255; Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888.

Petitioners cite enactment of that section and 7 U.S.C. § 7253 (Section 7253) in the 1996 Farm Bill in support of their argument that Section 7254 does not apply to California's pricing and pooling laws. Section 7253(a)(2) provided California producers a limited opportunity to participate in the federal milk marketing order system, as part of a more general reform of that system. Congress addressed, in detail, the United States Department of Agriculture's responses to Section 7253 in the Consolidated Appropriations Act of 2000 without any mention of

the California milk pricing and pooling laws. Consolidated Appropriations Act of 2000, Pub. L. No. 106-113, App. H-HR3428, 113 Stat. 1501A-517 (1999). Rather than show that Section 7254 does not apply to pricing and pooling, the enactment of Sections 7253 and 7255 in the 1996 Farm Bill, and other related congressional action, show more strongly a substantial congressional involvement in milk price regulation. It is reasonable to assume that Congress would quickly respond to any undue burden on interstate commerce imposed by California.

Perhaps the most significant practical limitation on California's milk pricing and pooling laws are the competing intrastate interests involved in the implementation of these laws. California milk producers have an interest in higher raw milk prices. California fluid milk processors have a clear, countervailing economic interest in keeping raw product costs as low as possible. These processors will strenuously resist any attempt to curtail delivery of out-of-state milk to their plants at competitive prices. Before it amends its minimum pricing and pooling plans, the Department must hold public hearings at which all interests, including out-of-state producers, may present their views. Cal. Food & Agric. Code §§ 61896, 61991, 61993, 62031, 62705, 62717. As it did when it adopted the 1997 pooling plan amendments, the Department provides a detailed discussion of all contested issues, including the concerns of out-of-state interests, and an explanation of its final determination.

A common theme in dormant Commerce Clause decisions is the perceived need to protect unrepresented out-of-state interests. 1 L. Tribe, American Constitutional Law § 6-5, at 1051-52 (3d ed. 2000). The competing interests of California producers and processors and the use of

a public hearing process and reasoned decisionmaking significantly lessen that concern with regard to California's milk pricing and pooling laws.

III. BECAUSE CALIFORNIA MILK POOLING LAWS DO NOT DISCRIMINATE BASED ON RESIDENCY, PETITIONERS CANNOT STATE A CLAIM UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE

The Privileges and Immunities Clause prevents a state from imposing discriminatory laws on nonresidents, by providing that "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const, Art. IV, § 2. Petitioners alleged in their complaints that the 1997 milk pooling plan amendments and all of California's milk pooling laws violate the Privileges and Immunities Clause by, among other things, requiring payment to the pool by California processors for milk purchased from outside of California, by denying out-of-state milk producers the right to purchase quota, and by denying out-of-state milk producers "the ability to conduct business in California under substantially the same terms as California producers." C.A. E.R. Tab 3, at 12:17-25.

California milk pooling laws regulate solely based on the location in California of milk production and processing; they do not, on their face, discriminate based on residency or citizenship. Primarily for that reason, the court of appeals upheld the district court's dismissal of

Petitioners' Privileges and Immunities Clause claim.[9] Appendix to Petition for Writ of Certiorari (Pet. App.) A13-A14. Petitioners do not dispute that the alleged discrimination is based on location of milk production, not on residency. Pet. Br. 42-43. Rather, they argue that the court of appeals erred by failing to consider the practical effect of the California laws on out-of-state dairies.

A. The Privileges and Immunities Clause Only Applies to State Laws that Discriminate Based on Residency

It is well-established that the Privileges and Immunities Clause is violated only if a state law discriminates against nonresidents, depriving them of a protected privilege that is accorded to residents. *New Hampshire v. Piper*, 470 U.S. 274, 284 (1985); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64-65 (1988). Even if a law discriminates based on residency, it will be upheld if there is a substantial reason for the discrimination and the discrimination against nonresidents is substantially related to the State's objective. *Piper*, 470 U.S. at 284.

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[9] All of the Petitioners initially alleged claims under the Privileges and Immunities Clause. The claims of all but one of the Petitioners, Darrel and Diane Kuiper, were dismissed because they are corporations and partnerships and therefore lack standing to bring the claim. *Western and S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 656 (1981) (the Privileges and Immunities Clause does not apply to corporations); *see also, W.C.M. Window Co., Inc. v. Bernardi*, 730 F.2d 486, 492-93 (7th Cir. 1994) (unincorporated association is not "citizen" within meaning of the clause). Petitioners do not challenge the dismissal of the corporate petitioners' claims. Pet. Br. 2, n.4.

The limited scope of the Privileges and Immunities Clause arises from its history and structure. The Privileges and Immunities Clause carried over a similar provision in the Articles of Confederation. *Zobel v. Williams*, 457 U.S. 55, 79 (1982) (O'Connor, J., concurring). Both provisions arose out of the same need to "fuse into one Nation a collection of independent, sovereign States." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). The Founding Fathers understood that, to form one nation, states could not discriminate against citizens of other states. A strong union could only be formed if nonresidents entering a state were accorded all the rights of the state's citizens with regard to such fundamental rights as travel and engaging in a trade. George F. Carpinello, *State Protective Legislation and Nonresident Corporations: the Privileges and Immunities Clause as a Treaty of Nondiscrimination*, 73 Iowa L. Rev. 351, 365-66 (1988).

To carry out this purpose, the Privileges and Immunities Clause requires that a state "place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Paul v. Virginia*, 75 U.S. 168, 180 (1868); *see also Toomer v. Witsell*, 334 U.S. 385, 395-96 (1948). Thus, the Clause guarantees that, when a nonresident enters a state, he will be permitted to do business on the same basis as the citizens of that state. It does not require that a state provide a nonresident with all of the privileges that they were afforded in their state of citizenship. *Paul*, 75 U.S. at 180-81.

The Privileges and Immunities Clause is also inapplicable to laws regulating the movement of goods across state lines; those laws are subject to the dormant Commerce Clause. "At the most elementary level, the primary

concern of the commerce clause is business that involves more than one state, whereas the core concern of the interstate privileges and immunities clause is the treatment received within a state by the citizens of other states." Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487, 499 (1981). Thus, the Clause has only been applied to laws that discriminate based on residency. *See, e.g., Supreme Court of Va. v. Friedman*, 487 U.S. 59, 64-65 (1988); *United Bldg. & Constr. Trades Council*, 465 U.S. 208, 216; *Austin v. New Hampshire*, 420 U.S. 656, 660 (1974); *Toomer*, 334 U.S. at 396.

Finally, the Privileges and Immunities Clause does not apply to laws, such as California's milk pooling laws, that classify based on location of production. States have broad powers to regulate products produced in-state, as long as the regulations do not unduly burden interstate commerce. In particular, states may regulate milk production. *See Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608 (1937). These laws may be subject to dormant Commerce Clause challenges, but are not subject to scrutiny under the Privileges and Immunities Clause.

B. Petitioners Improperly Attempt to Extend the Scope of the Privileges and Immunities Clause through the Application of the "Practical Effects" Test

Recognizing that the California milk pooling laws do not facially discriminate based on residency, Petitioners argue that this Court should adopt a "practical effects" test as part of its Privileges and Immunities Clause analysis. In so doing, Petitioners contend that "this Court's application of the Privileges and Immunities Clause has consistently involved an examination of the practical

effects of state laws and regulations when a State's discrimination against out-of-state residents is not expressed on the face of those laws." Pet. Br. 45. Contrary to Petitioners' argument, however, the "practical effects" test is not used to determine whether a law violates the Privileges and Immunities Clause, unless the law discriminates based on residency.

Petitioners' argument depends heavily upon a 1919 decision, *Chalker v. Birmingham & N.W. Ry.*, 249 U.S. 522 (1919). Other than *Chalker*, all of the cases relied upon by Petitioners involved laws that facially discriminated between residents and nonresidents. *Austin v. New Hampshire*, 420 U.S. 656, 660-61 (1975) involved a challenge to a New Hampshire income tax laws that provided different exemptions to residents and non-residents. *Shaffer v. Carter*, 252 U.S. 37, 56-57 (1920) and *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 73-74 (1920) involved challenges to state income tax laws that taxed different sources of income for residents and nonresidents and provided residents and nonresidents with different deductions.

In *Chalker*, this Court considered a challenge to a Tennessee tax that imposed an annual tax of $100 on each "foreign construction company" whose chief office was located outside the state. 249 U.S. at 525-26. Domestic construction companies and foreign construction companies that had their chief offices in the state were taxed only $25 per year. *Id.* at 526. The Tennessee Supreme Court had interpreted this law as imposing the $100 tax on any construction company having its chief office outside the state, regardless of whether the company was a citizen of that state. *Id.*

The Court held that the tax in *Chalker* violated the Privileges and Immunities clause. The Court explained

that they could "find no adequate basis for taxing individuals according to the location of their chief offices," and reasoned that because "the chief office of an individual is commonly in the state of which he is a citizen," this law "practically" discriminated based on residency. *Id.* at 527. Furthermore, "[u]nder the Federal Constitution a citizen of one State is guaranteed the right to enjoy in all other States equality of commercial privileges with their citizens; but he cannot have his chief office in every one of them." *Id.* This "arbitrary and unreasonable" law violated the Constitution. *Id.*

Although the Court in *Chalker* referred to how the law operated "practically," the case did not hold that the practical effect of a law must be assessed to determine whether the law discriminates based on residency in violation of the Privileges and Immunities Clause. Rather, the Court had to look beyond the face of the statute to determine whether the tax discriminated against out-of-state citizens because there was no plausible basis offered for the statutory classification. The Court recognized that the classification was merely pretextual and the law was intended to impose higher taxes on nonresidents.

Chalker is distinguishable from the instant case. The California milk pooling laws do not discriminate based on residence. Instead, they set minimum prices to be paid to producers and create a revenue pool for milk produced and processed within California. This classification reflects California's legitimate efforts to regulate milk produced and processed in-state, without requiring a minimum price for out-of-state production. Thus, unlike *Chalker*, there is a plausible basis for the statutory classification scheme and the laws are not pretextual.

The Court has rarely cited *Chalker* for any proposition in the more than eighty years since it was decided.

Chalker has not given rise during that time to the application of a "practical effects" test under the Privileges and Immunities Clause. The Court has continued to apply the Privileges and Immunities Clause solely to laws that classify based on residency. *See, e.g., Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 64-65 (1988); *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 216 (1984); *Austin v. New Hampshire*, 420 U.S. 656, 660 (1974); *Toomer v. Witsell*, 334 U.S. 385, 395-96 (1948).

C. The "Practical Effects" Test Developed in Dormant Commerce Clause Decisions Should Not Be Transplanted to the Privileges and Immunities Clause

The California milk pricing and pooling laws burden California milk producers by denying them the competitive advantage of being able to sell milk in California at below minimum prices. The laws benefit these producers by guaranteeing them a minimum price for milk.

Petitioners appear to argue that limiting the benefits (but not the burdens) of these laws to milk produced in California violates the Privileges and Immunities Clause. Petitioners cite no decisions in which laws that regulate based on location of production were found to violate the Privileges and Immunities Clause. Rather, they seek to transplant the practical effects test used in dormant Commerce Clause cases into the Privileges and Immunities Clause. This effort to treat the Privileges and Immunities Clause as equivalent to the dormant Commerce Clause is inappropriate.

Although the Privileges and Immunities Clause and the Commerce Clause have a common origin and a "shared

vision of federalism," *Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978), their focuses are quite different. As stated in *United Bldg. and Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 220 (1984):

> The two Clauses have different aims and set different standards for state conduct. The Commerce Clause acts as an implied restraint upon state regulatory powers. Such powers must give way before the superior authority of Congress to legislate on (or leave unregulated) matters involving interstate commerce. . . . The Privileges and Immunities Clause, on the other hand, imposes a direct restraint on state action in the interests of interstate harmony. . . . It is discrimination against out-of-state residents on matters of fundamental concern which triggers the Clause, not regulation affecting interstate commerce.

Thus, the Privileges and Immunities Clause focuses on comity, not commerce.

The dormant Commerce Clause protects against economic protectionism by prohibiting state laws that are "designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74 (1988). "State laws discriminating against interstate commerce on their face are 'virtually *per se* invalid'" *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996). Even laws that are evenhanded may nevertheless violate the dormant Commerce Clause if they unduly burden interstate commerce. *See Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 583 (1986) (fact that law regulates evenhandedly "is irrelevant if the 'practical effect' of the law is to control liquor prices in other states"); *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 775 (1945) (evenhanded

regulation of train lengths violates the Commerce Clause if the practical effect of such regulation is to control train operations beyond the boundaries of the state). The practical effects test is used to make the often difficult determination of an undue burden on interstate commerce.

Another significant difference between the dormant Commerce Clause and the Privileges and Immunities Clause involves the power of Congress. Congress cannot exempt states from the constraints of the Privileges and Immunities Clause, which it can do under the dormant Commerce Clause. *See Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 655-56 (1981) (Commerce Clause exemption does not exempt law from scrutiny under Privileges and Immunities Clause). Expanding the scope of the Privileges and Immunities Clause would limit Congress's ability to adapt to changing needs by allowing states to regulate specific areas of interstate commerce. Similarly, if Congress disagreed with the balance struck by the courts in determining the practical effect of a state law under the Privileges and Immunities Clause, it would be unable to adjust that balance. These constraints are especially salient in the context of interstate commerce where Congress has express constitutional power.

D. Applying a Discriminatory Intent Test in Privileges and Immunities Clause Cases as Suggested by the Solicitor General Would Be Improper

The Solicitor General agrees that the "practical effects" test proffered by Petitioners is inappropriate in the context of a Privileges and Immunities Clause claim. U.S. Br. 24-29. The Solicitor General then suggests that the Court consider drawing upon its Equal Protection Clause

decisions, and find that a facially neutral state law that has a discriminatory intent could violate the Privileges and Immunities Clause. The Solicitor General seems to recognize that this suggestion would alter the current scope of the Privileges and Immunities Clause. U.S. Br. 25-26. The Solicitor General also recognizes the great difficulty that Petitioners would have in this case showing a discriminatory intent. U.S. Br. 27-28 n.8.

The central purpose of the Equal Protection Clause is to eliminate racial discrimination. *Shaw v. Hunt*, 517 U.S. 899, 907 (1996). Many of the laws challenged under the Equal Protection Clause are facially neutral, and the invidious nature of the law, as applied to a suspect classification, is only apparent through its effect. But even if such an effect exists, the law violates the Equal Protection Clause only if it has a discriminatory intent or purpose. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977); *Washington v. Davis*, 426 U.S. 229, 241 (1976).

The Privileges and Immunities Clause merely requires the state to provide nonresidents with the same rights that are accorded to residents. *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). It does not address laws that have a disparate impact on nonresidents. Using the rational basis test, the court of appeals determined that the Petitioners had not shown that California milk pooling laws violate the Equal Protection Clause. Pet. App. A10-A13. There is no basis for requiring a more stringent Equal Protection Clause review indirectly through the Privileges and Immunities Clause. In any case, California's milk pricing and pooling laws were adopted without

any discriminatory intent for the purpose of regulating milk produced and processed in-state.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Dated: March 2003

Respectfully submitted,

BILL LOCKYER
Attorney General of the
State of California

MANUEL M. MEDEIROS
State Solicitor General

RICHARD M. FRANK
Chief Assistant Attorney General

LINDA L. BERG
BRUCE F. REEVES
MARK J. URBAN
(*Counsel of Record*)
Deputies Attorneys General

ANDREA HACKETT HENNINGSEN
STEEFEL, LEVITT & WEISS

Counsel for Respondents
William J. Lyons, Jr., Secretary, Department of Food Agriculture, State of California; Robert Tad Bell, Undersecretary, Department of Food & Agriculture, Stat of California

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Nos. 01-950, 01-1018

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In the Supreme Court of the United States

HILLSIDE DAIRY, INC., A&A DAIRY, L&S DAIRY, and MILKY WAY FARMS,

Petitioners,

v.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, and ROBERT TAD BELL, Undersecretary, Department of Food & Agriculture, State of California,

Respondents.

PONDEROSA DAIRY, PAHRUMP DAIRY, ROCKVIEW DAIRIES, INC., and DARREL KUIPER and DIANE KUIPER, D/B/A D. KUIPER DAIRY,

Petitioners,

v.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, and ROBERT TAD BELL, Undersecretary, Department of Food & Agriculture, State of California,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

LAWRENCE S. ROBBINS
ROY T. ENGLERT, JR.
ROBBINS, RUSSELL, ENGLERT ORSECK & UNTEREINER LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

CHARLES M. ENGLISH, JR.*
WENDY M. YOVIENE
NICHOLAS C. GEALE
THELEN REID & PRIEST, LLP
701 Pennsylvania Ave., N.W.
Suite 800
Washington, D.C. 20004
(202) 508-4000

* *Counsel of Record, 01-950*

(Additional counsel listed on inside front cover)

30 pp

JOHN H. VETNE
15 Powow St.
Amesbury, MA 01913
(978) 388-2480

RICHARD HESSE**
2 White Street
Concord, NH 03301
(603) 228-1541

** *Counsel of Record, 01-1018*

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REPLY BRIEF FOR PETITIONERS

This case presents (1) a statutory question about the scope of 7 U.S.C. § 7254 and (2) a constitutional question about the applicability of the Privileges and Immunities Clause to state requirements that discriminate in practical effect through the use of a classification that correlates closely with citizenship. This case does not call on the Court to resolve the underlying merits of the constitutional questions raised in the lawsuits.

With respect to the statutory question, respondents argue (a) that this Court's requirement that a Commerce Clause exemption be "unmistakably clear" does not really require the highest level of clarity, especially in light of "state sovereignty" principles (Resp. Br. 16-18); (b) that "it would have been pointless for Congress to have enacted Section 7254 without including a dormant Commerce Clause exemption" (Resp. Br. 21), so Congress *must have* included such an exemption in the statute, despite the lack of any allusion to the Commerce Clause in the statute or its legislative history; and (c) that the economic regulations of raw milk challenged in this litigation are somehow related to the compositional regulations of fluid milk referred to in the statute, so it is unmistakably clear that the protected California laws include the former as well as the latter, even though the statute does not say that it protects laws merely *related to* those it specifically protects (Resp. Br. 23-33). In each step of this analysis, respondents are demonstrably wrong, as we show in Point I below.

With respect to the Privileges and Immunities Clause question, respondents defend the Ninth Circuit's holding that petitioners' claim should be dismissed because the statutes and regulations at issue do not facially classify milk producers on the basis of citizenship or residency. Respondents assert that the contrary precedents on which petitioners rely are inapposite, and that undisturbed precedents of this Court are diminished over time by lack of frequent citation. Respondents are not correct in these assertions, as we show in Point II below. We further discuss in Point II the Solicitor General's suggestion that the Court should adopt a requirement that challengers

of facially neutral state laws asserting a Privileges and Immunities Clause claim must show intentional discrimination as a threshold matter, but the issue – as the Solicitor General acknowledges – is one that the Court need not reach. Rather, the "appropriate disposition" would be for the Court to "make clear that facial discrimination against citizens or residents of other States is not required and remand the claim for further consideration on the merits by the lower courts." U.S. Br. 28.[1]

Finally, respondents' amicus offers a response to our observations about the seriousness of the underlying constitutional challenges. This Court should not reach the constitutional merits, but we endeavor briefly to dispel some of the confusion underlying amicus's arguments – and correct a few of the misstatements in respondents' brief – in Point III below.

I. SECTION 144 OF THE 1996 FARM BILL DOES NOT EXEMPT CALIFORNIA'S PRICING AND POOLING PLANS FROM COMMERCE CLAUSE SCRUTINY

A. "[F]or a state regulation to be removed from the reach of the dormant Commerce Clause, congressional intent must be *unmistakably clear*." *South-Central Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 91 (1984) (emphasis added). It is difficult to imagine what more emphatic words this Court could have chosen to indicate the stringency of the clear-statement requirement applicable in this context. Yet respondents suggest that this Court really meant to express some form of intermediate scrutiny, less stringent than the clear-statement rule applicable in what respondents call "state sovereignty" cases. Resp. Br. 17.

Both as a matter of precedent and as a matter of logic and constitutional structure, respondents err. This Court's Justices have not treated the Commerce Clause clear-statement requirements and the requirements applicable in other areas as differ-

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[1] Except as otherwise noted, all references in this reply brief to "U.S. Br." are to the brief on the merits filed February 24, 2003.

ent. See *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 410 (1994) (O'Connor, J., concurring in the judgment) (citing, in Commerce Clause case, sovereign immunity decisions in *Dellmuth* v. *Muth*, 491 U.S. 223, 230 (1989), and *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992)). And it is broader principles of *federalism* – not merely "state sovereignty," which is but one aspect of federalism – that drive "the rules of construction [the Court has] followed to give proper respect to the federal-state balance." *Salinas* v. *United States*, 522 U.S. 52, 60 (1997) (citing, among other cases, *Gregory* v. *Ashcroft*, 501 U.S. 452, 467 (1991)). The entire concept of dormant Commerce Clause jurisprudence is that the *grant* of certain powers to Congress in the Clause is a simultaneous *denial* of certain powers to the States. *New Energy Co.* v. *Limbach*, 486 U.S. 269, 273 (1988). The structure of the Constitution demands just as clear a statement to alter that balance as it does to alter other federal-state balances.

Even if the entire purpose of clear-statement rules were to protect "state sovereignty," not the overall federal structure, California would not be the only State whose sovereign interests are to be considered. The States of Nevada, Minnesota, Montana, Oregon, Washington, and Wisconsin have appeared in this Court as amici curiae supporting petitioners. By vesting certain powers in the National Government to the exclusion of the individual States – such as the power to set minimum prices for interstate milk transactions, denied to the States by *Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511 (1935), but allowed to the U.S. Secretary of Agriculture through the Federal Milk Marketing Order program – the Commerce Clause protects the sovereign States from encroachment by each other. Cf. *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U.S. 573, 585 (1986). Before the Commerce Clause's protections are negated, then, it makes perfect sense to demand that the intent of Congress be made "unmistakably clear" (*South-Central Timber*, 467 U.S. at 91), so that it would be "plain to anyone reading the Act" (*Gregory*, 501 U.S. at 467; *Salinas*, 522 U.S.

at 60) that it negates the dormant Commerce Clause with respect to the laws and regulations at issue.

B. Petitioners and the United States have demonstrated that Section 144 of the 1996 Farm Bill, 7 U.S.C. § 7254, protects a set of California laws only from limitation by federal *statutory and regulatory* law and is not a Commerce Clause exemption, even for the state laws it protects. Pet. Br. 23-25, 30, 33 n.10; U.S. Br. 11-14. Respondents attempt – but fail – to show otherwise. Resp. Br. 18-23; see also WUD Br. 25-27.

Respondents' first argument is that there would be "surplusage" in the statute if it were not construed as a Commerce Clause exemption, because each verb in the phrase "preempt, prohibit, or otherwise limit" must have a distinct meaning. Resp. Br. 19-20. But milk is regulated at the federal level by numerous statutes, USDA regulations, USDA orders, and FDA regulations. See Pet. Br. 2-4. To ensure that none of *those* sources of federal statutory and administrative law would impede California's enforcement of its compositional standards for milk, Congress naturally used a broad series of verbs. To suggest that the breadth of the series of verbs requires a conclusion that Congress had the Commerce Clause in mind is to engage impermissibly in "mere speculation as to what Congress 'probably had in mind.'" *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982) (citation omitted).[2]

Respondents next argue that "[t]he language of Section 7254 is similar in breadth or specificity to the language of

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[2] In any event, surplusage is hardly unknown in federal statutory law. See, *e.g.*, *Chickasaw Nation* v. *United States*, 534 U.S. 84, 89, 94 (2001). The use of potentially redundant verbs to make emphatic the intent of Congress that federal statutory law not preempt state law is particularly common. *E.g.*, McCarran-Ferguson Act § 2(b), 15 U.S.C. § 1012(b) ("No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * *.").

the statutes and regulations that have previously been relied on by the Court in finding a dormant Commerce Clause exemption" (Resp. Br. 20), and place particular emphasis on the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015. There is, however, no relevant similarity between the McCarran-Ferguson Act (or any other statute respondents cite) and Section 144. Rather, as the Solicitor General observes (U.S. Br. 11-12 & n.2), "Congress has * * * spoken with considerably greater clarity in expressing its intent to immunize state laws from the implied limitations of the Commerce Clause."

Section 1 of the McCarran-Ferguson Act, 15 U.S.C. § 1011, provides that "Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." Section 2(a), 15 U.S.C. § 1012(a), provides that "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." Those extraordinarily broad affirmative grants of power to the States facially constitute Congress's effort to shift power over an entire business to the States. That shift could only be accomplished by negating the operation of the dormant Commerce Clause – the Clause that gives constitutional significance to "silence on the part of the Congress," 15 U.S.C. § 1011 – to restrict the States' power, and has no parallel in Section 144.[3] Furthermore, "[t]he law was enacted in 1945 in response to this Court's decision in *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533 [1944]" (*Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 217 (1979)), which

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[3] Section 144, instead, is most parallel to Section 2(b) of the McCarran-Ferguson Act, see note 2, *supra*, which is *not* the portion of the Act that effects a Commerce Clause exemption.

Congress considered "precedent-smashing" (*id.* at 218 n.16) precisely because it deemed insurance to be interstate commerce. See also *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 412-418, 427-433 (1946). Section 144 of the 1996 Farm Bill, by contrast, was enacted in response to an NLEA preemption decision, *Shamrock Farms Co.* v. *Veneman*, No. CIV-S-95-318, slip op. 3 (E.D. Cal. June 5, 1995). See Pet. Br. 32.

Indeed, respondents *concede* that "Section 7254 was Congress's response to NLEA" (Resp. Br. 22), yet they do so in the midst of an argument that "it would have been pointless for Congress to have enacted Section 7254 without including a dormant Commerce Clause exemption" (Resp. Br. 21). The concession is correct, but the argument in which it is embedded is not.

The question presented in this case is whether Congress (a) wanted California to be able, free of obstacles Congress itself and administrative agencies had imposed, to maintain its standards of identity for fluid milk or (b) wanted California to be able, free of *all* obstacles including constitutional prohibitions, to maintain its standards of identity for fluid milk (and to maintain and change its economic regulations for raw milk). Respondents merely *assert* – with no stronger supporting evidence than general statements in legislative history that California should be "able to fully enforce and apply its fluid milk standards" (H.R. CONF. REP. NO. 104-494 at 339, *reprinted in* 1996 USCCAN 683, 701, *quoted in* Resp. Br. 22) – that the latter, broader exemption rather than the former, narrower exemption was intended. But that technique of statutory interpretation runs afoul of two lines of this Court's precedents. First, it runs afoul of the rule that "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *PBGC* v. *LTV Corp.*, 496 U.S. 633, 647 (1990) (quoting *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987))

(emphasis in original).[4] Second, it runs afoul of the rule that "congressional intent must be unmistakably clear" before a statute will be construed to effect a dormant Commerce Clause exemption. *South-Central Timber*, 467 U.S. at 91.

Amicus complains that it is "simply *ex cathedra* without support in precedent or logic" (WUD Br. 26) to argue that "this Act or any other provision of law" is most naturally read to refer to nonconstitutional sources of law. This Court recently reaffirmed, however, that statutory phrases such as "other legal process" are to be construed by reference to the phrases that precede them. *Washington State Dep't of Social & Health Servs.* v. *Guardianship Estate of Keffeler*, 123 S. Ct. 1017, 1025 (2003). "'Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114-115 (2001), *quoted in Keffeler*, 123 S. Ct. at 1025. "Other provision of law," no less than "other legal process," should be construed in accordance with the *noscitur a sociis* and *ejusdem generis* canons applied in *Keffeler*. Section 144 is not a Commerce Clause exemption at all.

C. Petitioners and the United States have demonstrated that, whether or not it constitutes a Commerce Clause exemption, Section 144 does not exempt California's regulations governing the pricing and pooling of raw milk. Pet. Br. 16-23, 25-34; U.S. Br. 14-19. Respondents argue, to the contrary, that the relationship between raw-milk economic regulation and fluid-milk content regulation is so close that Congress must have exempted the former as well as the latter. Resp.

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[4] Statutes that grant States authorization to take particular actions without contravening federal statutory law, but leave them subject to the constraints of the Commerce Clause, are not at all uncommon. See, *e.g.*, *New England Power Co.* v. *New Hampshire*, 455 U.S. at 341; *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 49 (1980).

Br. 23-33. To make that argument, however, respondents must misdescribe both the federal statute and the state programs.

According to respondents, "The only possible limitation to the scope of Section 7254 is that the laws and regulations must regard *or relate to* fluid milk composition or labeling." Resp. Br. 24 (emphasis added). But that is not what the statute says at all. It refers to "any law, regulation, or requirement regarding * * * (1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or * * * (2) the labeling of such fluid milk products with regard to milk solids or solids not fat." 7 U.S.C. § 7254. Surrounding provisions speak with precision about "quota" and "manufacturing allowances," key components of California's systems of economic regulation. See Pet. Br. 22-23. Yet, respondents contend, Congress resorted to indirection and imprecision in Section 144, encompassing the entirety of California's pricing and pooling regulations for raw milk within the phrase "law, regulation, or requirement regarding [composition and labeling regulations for fluid (processed) milk]." The word "regarding" will not bear such weight – which is presumably why respondents attempt to insert "relate to" into the statute.

This Court has not given an expansive construction to the word "regarding" in federal statutes. In *City of Edmonds* v. *Oxford House, Inc.*, 514 U.S. 725 (1995), the Court held that a particular statute's "language – 'restrictions *regarding* the maximum number of occupants permitted to occupy a dwelling' – surely encompasses maximum occupancy restrictions. But the formulation does not fit family composition rules typically tied to land-use restrictions." *Id.* at 734-735 (emphasis added and footnote omitted). Yet *Edmonds* would have had to come out the other way if "regarding" were as broad a term as "relating to." Family composition rules certainly can – and the zoning rule at issue in *Edmonds* did (see *id.* at 728) – *relate to* the maximum number of occupants permitted to occupy a single-family dwelling unit. The "deliberately expansive" phrase

"relating to" (*Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 46 (1987); see also *Morales* v. *TWA*, 504 U.S. 374, 383-384 (1992)) does not appear in Section 144 and should not be read into it when the word the statute does use – "regarding" – is conventionally and in context given a narrower meaning.

Even if a "relationship" between California's pricing and pooling laws for raw milk and its standards of composition for fluid milk somehow mattered, respondents could not prevail because they have overstated the relatedness of the three distinct sets of laws. Composition standards deal with ingredient content of fluid milk (milkfat, solids not fat (SNF), and water) after it has been processed and packaged. *E.g.*, Cal. Food & Agric. Code § 35784 (prescribing content of "[m]arket milk, at the time of delivery to the consumer"). They regulate the conduct of processors, not dairy farmers, are administered by the Milk and Dairy Foods Control Branch of CDFA, and correspond to FDA (not USDA) regulations at the federal level. See Pet. Br. 2-3, 6-7. Minimum pricing and pooling regulations, on the other hand, deal with the economic regulation of unprocessed milk sales by dairy farmers to processors. See Pet. Br. 3, 7-10. The Milk Stabilization Branch administers minimum prices, and the Pooling Branch separately administers pooling. *Ibid.* The history of these three different programs establishes that composition standards can be administered without regard to minimum pricing or pooling. California's composition standards existed for 28 years before minimum pricing existed, 62 years before pooling existed, and 90 years before the challenged 1997 pooling amendments existed. *Ibid.* California does not need pricing and pooling *at all* – let alone the 1997 amendments extending aspects of California's economic regulatory programs extraterritorially – to "establish or continue to effect" compositional regulation. 7 U.S.C. § 7254. Indeed, by providing *in the 1996 Farm Bill itself* a mechanism (see 7 U.S.C. § 7253(a)(2), JA 17) to replace California pricing and pooling with a federal milk marketing order, Congress irrefutably demonstrated *its* understanding that Section 144

would have meaning and effect with or without any particular pricing or pooling rule.

The assertion that California's pricing and composition standards are connected by historical relationship (Resp. Br. 24-25) is misleading in that it suggests that the fortification requirements adopted in 1968 could not have been implemented without changing the minimum price regulations to multiple-component pricing. The composition standards and multiple-component pricing were linked by interest-group politics, not inherent interrelatedness. See Economic Research Service, USDA, Nationwide Adoption of the California Solids Standards for Fluid Milk Products, Staff Rep. No. AGES840816 at 3 (Aug. 1984) ("[P]roducers resisted the processors' efforts. A compromise was ultimately reached which allowed the marketing of lowfat milk in California, but only in conjunction with revisions in the state milk marketing order to include payment * * * which took explicit and direct account of both the fat and SNF content of a producer's milk."). In any event, as the Solicitor General has observed, component pricing under the Stabilization Act pertains to the fat and SNF components of *raw* milk, whereas Section 144 refers to the percentage of the added ingredients in *fluid* milk. U.S. Br. 15 n.4.[5]

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[5] Compliance with packaged-fluid-milk standards is achieved not from raw milk, for which there is no state composition regulation, but from processor activities of "adding or subtracting fats and solids to meet the minimum and maximum level for standardized products." L.J. Butler, Maintaining the Competitive Edge in California's Dairy Industry: Part I – Organization and Structure 25 (1992). "In order for milk processors to comply with California's compositional standards, they must fortify most of their milk by adding condensed milk or milk powder." *Shamrock Farms Co.* v. *Veneman*, 146 F.3d 1177, 1178 (9th Cir. 1998), cert. denied, 525 U.S. 1105 (1999). California does not regulate prices for these finished manufactured products, but provides a subsidy to processors in the form of a fortification allowance.

The assertion that *minimum* prices are somehow necessary to control raw milk costs, in order to prevent California's heightened composition standards from making packaged beverage milk more expensive for consumers (Resp. Br. 26), is a counterintuitive, post hoc rationalization that is contradicted by the California trade association for processors. Dairy Institute of California explained at the cert. stage that its interest in this litigation was in preserving unimpeded access to out-of-state milk in order to control processors' raw milk costs. Dairy Inst. Br. 4 (filed Mar. 5, 2002).

The assertion that there have been formal declarations that California's minimum price regulations are important to the maintenance or advancement of composition standards (Resp. Br. 27) cannot save the day for respondents. They rely on Cal. Food & Agric. Code § 61802(c) (JA 23), which declares at a very high level of generality that some relationship exists between economic regulation of milk and "standards of content and purity." A similar observation, at an equally high level of generality, was conceded to be true in *Baldwin*, 294 U.S. at 523 ("Economic welfare is always related to health, for there can be no health if men are starving."). But this Court went on to say that "giv[ing] entrance to that excuse would invite a speedy end to our national solidarity." *Ibid.* The question now before the Court is not whether one can find a high enough level of generality to state some way in which composition standards are *related to* economic regulation – "really, universally, relations stop nowhere" (*New York State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins Co.*, 514 U.S. 645, 655 (1995)) – but whether it is unmistakably clear that Congress wished to make an exception to "our national solidarity" broad enough to cover state pricing and pooling plans. Respondents have not shown that Congress did so. Their attempt to connect pricing to composition, then pooling to pricing, and then pooling to composition is far too attenuated for this Court to conclude that Congress clearly intended to exempt all pooling regulations from Commerce Clause scrutiny.

II. ANALYSIS OF THE PRIVILEGES AND IMMUNITIES CLAUSE CLAIMS MUST CONSIDER THE PRACTICAL EFFECT OF THE REGULATORY SCHEME ON OUT-OF-STATE DAIRY FARMERS

A. Respondents argue that *Chalker* v. *Birmingham & N.W. Ry.*, 249 U.S. 522, 527 (1919), is inapplicable to the situation before the Court and that its precedential value is diminished by the infrequency with which it has been cited. Respondents misperceive the opinion in *Chalker*, whose approach has been followed even when the case has not been cited.

In *Chalker* this Court clearly stated its disagreement with the conclusion of the Tennessee Supreme Court that Tennessee did not violate the Privileges and Immunities Clause because citizens of Alabama could avoid alleged discrimination simply by locating their chief business office in Tennessee. Following the discredited lead of Tennessee, California has consistently argued that out-of-state dairy farmers may avoid alleged discrimination simply by locating their farms in California, and the Privileges and Immunities Clause therefore does not apply.

This Court made clear that practical considerations are significant: "neither under form of classification nor otherwise can any state enforcing tax laws which in their practical operation materially abridge or impair the equality of commercial privileges secured by the federal Constitution." 249 U.S. at 526-527.

Respondents (at 37-38) and their amicus (WUD Br. 29-30) seek to distinguish *Chalker* by focusing on a single line in the opinion: "We can find no adequate basis for taxing individuals according to the location of their chief offices – the classification, we think, is arbitrary and unreasonable." 249 U.S. at 527. That statement, however, is the application of the constitutional standard to the facts presented and has no bearing on the preliminary question whether there is discrimination within the scope of Article IV, § 2. The Court was simply addressing the

merits and drawing the conclusion that the Tennessee statute failed to provide any "substantial reason for the difference in treatment." *United Building & Construction Trades Council* v. *Mayor of Camden*, 465 U.S. 208, 222 (1984).

Respondents argue (at 38-39) that *Chalker* is somehow diminished by the relatively infrequent references to it by the Court and by the absence of something they call the "practical effects test."[6] To reach that conclusion, respondents set aside the illustrative precedents of *Austin* v. *New Hampshire*, 420 U.S. 656 (1975), and *United Building & Construction Trades Council, supra*, cited in petitioners' opening brief (at 46-47). In those cases, the practical approach reflected in *Chalker* is employed and preserved, while the formalistic approach urged by respondents is rejected. Indeed, the well-established reach of the Clause to protect non-residents against state discrimination is itself a practical "effect" test to protect "citizens of each state." *Ward* v. *Maryland*, 79 U.S. (12 Wall.) 418, 430 (1870). With or without citation to *Chalker*, a "concern with practical effect" has continued to animate this Court's analysis and resolution of Privileges and Immunities Clause claims. *Lunding* v. *New York Tax Appeals Tribunal*, 522 U.S. 287, 301 (1998).

Given that it is a "rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate

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[6] There is irony in respondents' suggestion that this Court disavow *Chalker* because it is old and infrequently cited. Most observers think that this Court's Privileges and Immunities Clause precedents since 1919 have moved *away* from "absurd formalism." Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 270 n.35 (1987). See also John Hart Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 181 (1981) (The Privileges and Immunities Clause "was plainly intended to prevent discrimination against out-of-staters * * *. And indeed, with minor and soon-corrected diversions, that is precisely the spirit in which it has been interpreted for the two centuries it has been in the Constitution.").

goods" (*Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 (1951)), limiting Privileges and Immunities Clause claims to facial discrimination against citizens of other States would put citizens at the mercy of legislative ingenuity in crafting discriminatory laws. There is no reason for this Court to depart from precedent and embrace such an approach.[7]

B. The Solicitor General supports the conclusion that the Ninth Circuit erred in dismissing the Privileges and Immunities Clause claim. By analogy to developments in equal protection law, however, the Solicitor General suggests that intentional discrimination might be an appropriate threshold requirement, at least in the case of a facially neutral state statute. U.S. Br. 24-27. Petitioners respectfully disagree.

It is established law that the Commerce Clause and the Privileges and Immunities Clause are "mutually reinforcing," *Hicklin* v. *Orbeck*, 437 US 518, 531-532 (1978), and the Solicitor General acknowledges that relationship. U.S. Br. 21. To impose the requirement of intentional discrimination on Privileges and Immunities Clause claims would effectively minimize the "reenforcing" capacity of the Clause.

In *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868), Justice Field's often-quoted opinion for the Court said:

> It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. * * * It has been justly said that no provision in the Constitution

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[7] Amicus Western United Dairymen argues that the California regulatory scheme does not discriminate against out-of-state milk producers. The factual issue of discrimination, however, cannot be decided on a motion to dismiss. It is sufficient for present purposes that discrimination was properly pleaded and placed before the courts below. C.A. E.R. Tab 5, ¶ 70; see also Pet. Br. 43 n.16.

> has tended so strongly to constitute the citizens of the United States one people as this.

Accord *Lunding*, 522 U.S. at 296; *Hicklin*, 437 U.S. at 524. That assessment of the broad, structural purposes and functions of the Privileges and Immunities Clause, along with the views expressed in more modern cases (*Supreme Court of New Hampshire* v. *Piper*, 470 U.S. 274 (1985); *United Building & Construction Trades Council, supra*; *Hicklin* v. *Orbeck, supra*; *Austin* v. *New Hampshire, supra*; *Toomer* v. *Witsell*, 334 U.S. 385 (1948)), addresses itself to results to be achieved and not the motives of state legislators and regulators. The harm to national unity and to the concept of a free market are the evils to be avoided. The presence of those evils is not reduced or eliminated when they are produced by inadvertence.

As revealed in Commerce Clause analysis, discrimination may appear in several forms – on the face of a statute, by discriminatory intent behind a facially neutral statute, or by discriminatory effect of a facially neutral statute. See, *e.g.*, *Chemical Waste Management, Inc.* v. *Hunt*, 504 U.S. 334, 344 n.6 (1992); *Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1979). There is no reason why this Court should use this case to cut off Privileges and Immunities Clause scrutiny of some categories of discrimination. See also *Piper*, 470 U.S. at 284 n.17 (rejecting the dissent's contention that the only function of a less-restrictive-means analysis under the Privileges and Immunities Clause was to ferret out intentional discrimination, or the "illegitimate" state goal of "discrimination for its own sake").

In any event, the courts below did not reach – and this Court need not reach – questions about the kinds of discrimination that will actually violate the Privileges and Immunities Clause. The Ninth Circuit held that "classifications * * * based on the location where milk is produced" need not even be *scrutinized* under the Privileges and Immunities Clause (Pet. App. A14), and that holding flies in the face of this Court's

precedents. The Court should reverse that holding and leave further analysis of the constitutional merits to the courts below.

III. RESPONDENTS AND THEIR AMICUS MISSTATE CRITICAL FACTS BEARING ON THE CONSTITUTIONAL MERITS, BUT THE COURT NEED NOT RESOLVE THOSE ISSUES

Respondents and their amicus mischaracterize the amended pooling plan as simply an accounting system that has no real-life impacts on the ability of out-of-state dairy farmers to sell milk to California processors. To paint that picture, respondents and their amicus engage in inventive semantics to obfuscate the differences in form and function between California's regulation since 1935 of minimum classified milk prices payable by processors (under the Milk Stabilization Act and Stabilization Plans), and the State's redistribution of these minimum prices to California dairy farmers since 1969 (under the Gonsalves Pooling Act and Pooling Plan).

A processor's "gross pool obligation" is exclusively a function of, and derived from, minimum milk pricing under the Stabilization Act. Other terms and concepts in the "elaborate accounting system" (Resp. Br. 5) refer to the manner in which regulated prices are redistributed to California dairy farmers, and the processors' ministerial obligations in this process.[8] At bottom, however, the processors' payments to dairy farmers, plus payments to the pool, represent nothing more than payment of (or accounting for) minimum prices owed under the Stabilization Act. The *form* – as opposed to the *amount* – of those payments is bifurcated for the convenience of Califor-

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[8] Thus, the terms "quota price," "overbase price," "pool price," "blend price," "quota credit," "pool obligation," "credit against gross pool obligation," "pool obligation credit," "pool credit," and "credit price" (Resp. Br. 6-9; WUD Br. 5-10) are purely functions of revenue redistribution among California farmers; they do not alter the processor's minimum price obligations.

nia's dairy farmers. See Pet. Br. 8; U.S. Br. 16-17; Resp. Br. 29.

Because pool accounting on the processor side does nothing more than enforce minimum classified milk prices under the Stabilization Act, California's establishment of *any* "gross pool obligation" on out-of-state milk is a regulation of minimum pricing for out-of-state milk. Thus, respondents' claim that "*pooling plan amendments* do not establish any minimum price that a California processor is required to pay for out-of-state milk" (Resp. Br. 9 (emphasis added)) is artfully disingenuous in that processor minimum prices are fixed under the Stabilization Act, not the Pooling Act.

Nevertheless, respondents now attempt to disavow the finding that they acceded to during the preliminary injunction hearing before the district court that Stabilization Act Sections 62077 and 62078 (JA 25), as applied to out-of-state milk, violate *Baldwin* v. *Seelig* (P.I. Tr. 2 (July 31, 1997); P.I. App. Tab 42 at 6 n.13; P.I. App. Tab 28) by saying that California's minimum price laws apply only to milk produced *in California*. See Resp. Br. 1 ("California has its own laws establishing minimum prices paid by California processors *for milk produced within the state* and the minimum prices received by the producers for that milk.") (emphasis added); *id.* at 2 ("Nor does California mandate any minimum prices for milk produced outside of California."); see also WUD Br. 21. If those assertions were accurate, these lawsuits would not have been necessary. The record reflects that California's laws and regulations provide for a *Baldwin*-prohibited minimum price in at least two ways.

First, Sections 62077 and 62078 of the Stabilization Act violate the Commerce Clause under *Baldwin* v. *Seelig* when applied to out-of-state milk. P.I. Tr. 2, 31. Those provisions make no distinction between in-state and out-of-state milk, and they have been used in the past to enforce minimum prices with respect to out-of-state milk. P.I. Tr. 2. Second, even

while claiming that California does not now enforce those sections, the State in fact continues to enforce a "gross pool obligation" equal to the minimum classified price on out-of-state milk, and after applying a credit to that obligation requires a payment "into the pool" for the benefit of and distribution to California producers. Resp. Br. 5-6.

Additionally, WUD somehow turns petitioners' clear allegations of a *Baldwin*-prohibited minimum price on their head and incorrectly argues that petitioners' sole constitutional objection to the 1997 amendments is that they impose a maximum price. WUD then relies on cases such as *County Line Cheese Co.* v. *Lyng*, 823 F.2d 1127 (7th Cir. 1987), and *Lehigh Valley Coop.* v. *United States*, 370 U.S. 76 (1962), which scrutinize the milk regulatory actions of the U.S. Secretary of Agriculture, for the proposition that a maximum price is permissible. WUD Br. 18-19. But California does not have the luxury of emulating the U.S. Secretary of Agriculture, who has express statutory authority to regulate interstate commerce and to equalize payments to farmers and to processors. 7 U.S.C. § 608 *et seq*. It is inappropriate to rely on *Lehigh* or *County Line* to ascertain that which constitutes permissible *state* regulation.[9]

Respondents' effort to ascribe a non-protectionist purpose to the 1997 pooling amendments, and to characterize them as wholly in-state regulation, has caused respondents to mix concepts that cannot logically justify the 1997 pooling amendments. Respondents state that the 1997 pooling amendments were necessary to remove an artificial incentive for California processors to purchase out-of-state milk for less. Resp. Br. 7-8. First, the record demonstrates there was no such incentive. Even before 1997, California processors were paying

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[9] Petitioners have cited *Lehigh* for the proposition that not even the federal government is permitted to impose pool charges that insulate farmers from interstate milk competition. Pet. Br. 40.

the minimum price on both in-state and out-of-state milk. P.I. Tr. 2; P.I. App. Tab 42 at 6 n.13. Since the total price California processors were paying for out-of-state and in-state milk was the same, the 1997 pooling amendment cannot have been necessary to remove an incentive California processors had to purchase out-of-state milk over in-state milk.

Still further, this rationale would have the Court believe that changes in pooling would somehow affect a California processor's total minimum price obligation. However, the pooling regulations do not alter the total minimum price paid by California's processors; pooling affects how or whether the minimum price is allocated between the California dairy farmer revenue pool and the actual dairy farmer supplier. Pet. Br. 8, U.S. Br. 16-17. California dairy farmers through CDFA sought not to alter the *buyers'* incentives but to diminish the economic incentive to *sell* out-of-state milk to California processors by intercepting out-of-state dairy farmer revenue (the pool obligation) and dividing it among California dairy farmers exclusively. Pet. Br. 38-39. Thus, for out-of-state dairy farmers, changes in the 1997 pooling plan were far from a simple accounting change.[10]

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[10] Even if one assumes that roundtripping (see Resp. Br. 29-30) was the primary catalyst for the 1997 pooling amendments – though petitioners have strenuously argued below that it was not – the existence of roundtripping itself demonstrates that the 1997 amendments were designed to have real-life impacts on dairy farmer incentives to sell milk into California from out of state. Respondents themselves described roundtripping as a practice by *California farm groups* to obtain a better price for California overbase milk, whereby non-quota milk was shipped out of state by California dairy farmers and replaced with a commensurate volume from out of state, which was then returned to California. CDFA C.A. Br. 16. This description reveals that the changes to the pooling plan, even if intended to deal with the problem of roundtripping, altered the economic incentives of dairy farmers (not processors) by altering the price dairy farmers

Finally, amicus erroneously suggests that there can be no discrimination because "the 1997 Amendment has set the credit for out-of-state milk at the *highest* price that only a handful (3.4%) of California producers receive." WUD Br. 19. That statement both is untrue[11] and misses the point. The true benefits of pooling cannot be measured solely by the level of the blend price received. Pet. Br. 41. By mandating the pooling of out-of-state milk to intercept revenue from out-of-state milk transactions, without also granting to out-of-state farmers full access to pooling, the 1997 amendments subjected out-of-state dairy farms to disparate treatment that benefited California dairy farmers at the expense of out-of-state dairy farmers in violation of *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 199 (1994); see also Pet. Br. 41. Thus, it is a hollow exercise for WUD to argue that the amended pooling plan can somehow be defended as a "direct subsidization of local industry" when out-of-state funds are being used. Cf. *New Energy Co.* v. *Limbach*, 486 U.S. 269 (1988).

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

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could receive on milk shipped from outside of California.

[11] The language of the amended regulation makes clear that the "credit" (and thus the price paid to the out-of-state dairy in practice) is the *lower* of modified quota or plant blend. Pooling Plan § 900(d), JA 47-48. Out-of-state dairies have often sold milk to plants that have a plant blend price below quota. Gruebele Supp. Decl. ¶ 23, C.A. E.R. Tab 11N at 8-9. Additionally, even if petitioners could always be paid the quota price, it still would not be the "highest price" available; out-of-state dairy farmers are denied the pool subsidy (as high as 58 cents per hundred pounds of milk) known as a transportation allowance. See Pooling Plan § 921.2(e), (f) <http://www.cdfa.ca.gov/mkt/mp/POOLPLAN_09-01.pdf>.

Respectfully submitted,

LAWRENCE S. ROBBINS
ROY T. ENGLERT, JR.
ROBBINS, RUSSELL, ENGLERT
ORSECK & UNTEREINER LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

CHARLES M. ENGLISH, JR.*
WENDY M. YOVIENE
NICHOLAS C. GEALE
THELEN REID & PRIEST, LLP
701 Pennsylvania Ave., N.W.
Suite 800
Washington, D.C. 20004
(202) 508-4000

* *Counsel of Record, 01-950*

JOHN H. VETNE
15 Powow St.
Amesbury, MA 01913
(978) 388-2480

RICHARD HESSE**
2 White Street
Concord, NH 03301
(603) 228-1541

** *Counsel of Record, 01-1018*

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Nos. 01-950 and 01-1018

In the Supreme Court of the United States

HILLSIDE DAIRY INC., A&A DAIRY, L&S DAIRY, AND MILKY WAY FARMS, PETITIONERS

v.

WILLIAM J. LYONS, JR., SECRETARY, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, ET AL.

PONDEROSA DAIRY, PAHRUMP DAIRY, ROCKVIEW DAIRIES, INC., AND D. KUIPER DAIRY, PETITIONERS

v.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
BARBARA MCDOWELL
Assistant to the Solicitor General
MARK B. STERN
ARA B. GERSHENGORN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 7 U.S.C. 7254 exempts California's milk pricing and pooling regulations from scrutiny under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3.

2. Whether the individual petitioners' claim under the Privileges and Immunities Clause, U.S. Const. Art. IV, § 2, is foreclosed because California's milk pricing and pooling regulations do not discriminate on their face based on state citizenship or residence.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

These consolidated cases concern the construction of a provision of an Act of Congress, 7 U.S.C. 7254, that the court of appeals held to exempt California's regulations governing the pricing and pooling of raw milk from scrutiny under the Commerce Clause. The United States has a significant interest in assuring that such provisions are not construed more expansively than was intended by Congress, and in a manner that could burden interstate commerce. At the

Court's invitation, the Solicitor General filed an amicus brief on behalf of the United States at the petition stage of the cases.

STATEMENT

This case concerns whether 7 U.S.C. 7254, which saves from preemption certain California laws regarding the composition and labeling of "fluid" (*i.e.*, processed) milk, exempts the State's entire program regulating the market in "raw" (*i.e.*, unprocessed) milk from Commerce Clause scrutiny. The case also concerns whether California's milk regulations, even if exempt from scrutiny under the Commerce Clause, nonetheless violate the Privileges and Immunities Clause in Article IV of the Constitution. Those questions arise against the backdrop of a complex regulatory regime.

1. The United States, like the State of California, regulates the marketing of raw milk in order to stabilize prices and assure adequate supply. The need to regulate milk marketing derives from two distinct phenomena: (1) a pricing structure that permits different returns for raw milk of the same quality depending upon its end use (*e.g.*, as fluid milk, as powdered milk, or as an ingredient in products such as butter and cheese), and (2) a cyclical production process with fairly stable demand, which requires farmers to maintain sufficiently large herds to meet the demand for fluid milk even in periods of lean production. See *Zuber* v. *Allen*, 396 U.S. 168, 172-173 (1969). Those two features led to "utter chaos" when the market was unregulated. *Id.* at 174. In an effort to "restore order to the market and boost the purchasing power of farmers," *ibid.*, Congress enacted the Agricultural Adjustment Act, ch. 25, 48 Stat. 31, which later formed the basis for the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. 607 *et seq.*

The AMAA authorizes the Secretary of Agriculture to "establish and maintain such orderly marketing conditions * * * as will establish, as the price to farmers, parity

prices." 7 U.S.C. 602(1). It accordingly empowers the Secretary to issue "marketing orders" that regulate minimum prices that dairy farmers may receive in a defined geographic area. The orders classify milk according to its end use, establish a minimum price for each class of milk, and require regulated distributors to account to a regional pool for each class of milk that they purchase. The regional pools assure dairy farms a uniform "blend price" for each unit of milk sold based on a weighted average value of all milk sold within the marketing area. See *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 189 n.1 (1994); *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 342-343 (1984).

2. Not every geographic area in the United States is covered by a federal marketing order. See 7 C.F.R. Pts. 1000-1199; *Block*, 467 U.S. at 342. The California dairy industry has never participated in such an order. Instead, the State has adopted its own regulatory program to stabilize the market for raw milk. California dairy farms are guaranteed a uniform minimum return for their raw milk, regardless of the end use to which the raw milk is to be put by a processor (handler). At the same time, California handlers are required to make different total outlays for raw milk depending upon its end use, which reflects the higher value of raw milk used to produce fluid milk over raw milk used to produce other products. A pooling mechanism reconciles the varying minimum amounts that handlers are required to pay for raw milk with the uniform minimum amounts that California dairy farms are guaranteed to receive for raw milk.

a. To accomplish those regulatory goals, California assigns raw milk to one of five classes depending upon its end use. Cal. Food & Agric. Code §§ 61932-61935 (West 2001). Class 1, which consists of raw milk used to produce fluid milk products, typically demands the highest price. Other classes, such as raw milk used to produce butter (Class 4a) and

cheese (Class 4b), typically demand lower prices. The California Department of Food and Agriculture (CDFA) establishes a minimum price for each component of raw milk (butterfat, solids-not-fat, and fluid carrier) depending on the class of product into which the raw milk is to be processed. A handler that purchases raw milk for processing into fluid milk is obligated to pay at least the Class 1 price, while a handler that purchases raw milk for processing into cheese is obligated to pay at least the Class 4b price.

The price that a handler pays for raw milk—which, as explained above, is based on its end use—does not necessarily equal the price that a dairy farm receives for raw milk. All California dairy farms are guaranteed a uniform minimum price for their raw milk regardless of how the milk is used by the handler that buys it. Otherwise, because handlers that produce fluid milk can pay higher prices for raw milk than can handlers that produce other milk products (because fluid milk commands higher retail prices than other milk products), dairy farms would have an incentive to compete to sell their raw milk to handlers that produce fluid milk. Such competition was thought to result in the inefficient movement of milk around the State. Pet. App. A3, A14 n.3 in *Hillside Dairy Inc.* v. *Lyons* (No. 01-950) (Pet. App.).

The uniform minimum price guaranteed to California dairy farms is a blend price, which CDFA computes based on a weighted average of all raw milk purchases in the State. It thus falls somewhere between the Class 1 price and the Class 4 price. See Pet. App. A3. In fact, CDFA computes two such blend prices—the "quota" price and the "overbase" price. See CDFA, Milk Pooling Branch, *Pooling Plan for Market Milk As Amended* §§ 902-904 (Sept. 1, 2001) <http://www.cdfa.ca.gov> (*Pooling Plan*). The quota price, which is the higher of the two, is paid for an amount of production that was originally determined for California dairy farms based on their respective shares in the 1960s of

the market for raw milk used to produce fluid milk and that has been subject to certain adjustments in subsequent years. See Cal. Food & Agric. Code § 62707 (West 2001); Pet. App. A3-A4. The "overbase" price is paid for a California dairy farm's milk in excess of any quota.[1]

The pooling mechanism among handlers, which results in a transfer of funds from handlers of raw milk for higher-priced uses (*e.g.*, fluid milk) to handlers of raw milk for lower-priced uses (*e.g.*, butter and cheese), reconciles the uniform price guaranteed to California dairy farms with the different prices paid by handlers depending upon the uses that they make of raw milk. In order to determine each handler's obligation to the pool, CDFA calculates an "in-plant blend price" for each handler, which is based on the particular use or uses that the handler makes of the raw milk that it purchases. See *Pooling Plan* Art. 9. (The in-plant blend price must be distinguished from the "quota" and "overbase" blend prices, which are uniform prices paid to California dairy farms and are based on usage of raw milk by *all* handlers, rather than by a single handler.) The handler's in-plant blend price is then multiplied by the total amount of raw milk that the handler has purchased to determine the handler's "gross pool obligation." The handler must account to the pool based on that amount, subject to certain adjustments. If the total amount of a handler's payments to dairy farms is less than its pool obligation (as is typically the case for handlers that primarily produce Class 1 fluid milk because their in-plant blend price ordinarily exceeds the "quota" and "overbase" prices guaranteed to dairy farms), the handler pays the difference into the pool. *Id.* § 1003. If the total amount of a

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[1] California dairy farms may buy and sell quota. See Pet. App. A4. Out-of-state dairy farms are not permitted to own quota because quota is available only to a "[p]roducer," which is defined as "any person that produces market milk in the State of California from five or more cows." *Pooling Plan* § 104 (Pet. App. A79).

handler's payments to dairy farms exceeds its pool obligation (as is typically the case for handlers that primarily produce butter or cheese because their in-plant blend price ordinarily is lower than the "quota" and "overbase" prices), the handler draws on the pool to recover the difference. *Id.* § 1004; see Pet. App. A3-A5.

b. Before the 1997 amendments to the California plan, if a handler bought milk from an out-of-state dairy farm, the handler received a credit against its pool obligation based on its in-plant blend price. Pet. App. A17. As a consequence, although a handler that principally produced fluid milk had to pay money into the pool for its raw milk purchases from California dairy farms, it did not have to pay money into the pool for its purchases from out-of-state farms.

In 1997, the California plan was amended so that the credit that a handler receives for out-of-state milk purchases is equal to the lower of the handler's in-plant blend price or the quota price. See *Pooling Plan* § 900(d); Pet. App. A4-A5. As noted, for a handler that principally produces fluid milk, the quota price is ordinarily lower than its in-plant blend price. As a result, a handler that purchases raw milk from an out-of-state dairy farm to be processed into fluid milk typically must contribute some additional amount to the pool for those purchases. The 1997 amendment thus reduced an incentive that previously existed for handlers that produce fluid milk to purchase raw milk from dairy farms outside California. At the same time, however, out-of-state dairy farms, unlike California dairy farms, are not guaranteed any minimum price (much less the quota price) for their raw milk.

c. California also sets compositional standards for fluid milk sold in the State. Those standards, which exceed the standards set by the federal Food and Drug Administration, establish minimum levels of solids-not-fat and butterfat. See Cal. Food & Agric. Code § 35784 (West 2001). California

handlers standardize their fluid milk by adding a fortifying agent, and they are provided with a fortification allowance that reduces the cost of doing so. *Pooling Plan* § 803(k). Out-of-state handlers are not eligible to receive that fortification allowance. See Pet. App. A25-A26.

3. In the Federal Agriculture Improvement and Reform Act of 1996 (FAIR Act), Pub. L. No. 104-127, 110 Stat. 888, Congress required the consolidation and reformation of federal milk marketing orders. See 7 U.S.C. 7253. Congress authorized the Secretary of Agriculture, "[u]pon the petition and approval of California dairy producers," to "designate the State of California as a separate Federal milk marketing order." 7 U.S.C. 7253(a)(2).

In addition, Congress included in the FAIR Act the provision at issue in this case, 7 U.S.C. 7254, which states:

> Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding—
>
> (1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or
>
> (2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

4. a. In consolidated actions, petitioners, which operate dairy farms in Nevada and Arizona, challenged the constitutionality of the 1997 amendments to the California milk pricing and pooling plan. They contended, among other things, that the amended plan discriminates against out-of-state dairy farms in violation of the Commerce Clause and the Privileges and Immunities Clause.

a. The district court rejected those claims. Pet. App. A13, A16-A22. The court granted summary judgment for

the State on the Commerce Clause claim. The court relied on *Shamrock Farms Co.* v. *Veneman*, 146 F.3d 1177 (9th Cir. 1998), cert. denied, 525 U.S. 1105 (1999), which the court understood to have held that 7 U.S.C. 7254 "immunized California's milk pricing and pooling laws from Commerce Clause challenge." Pet. App. A19. The court dismissed petitioners' claim under the Privileges and Immunities Clause on the ground that the pooling plan does not discriminate based on out-of-state residency or citizenship. *Id.* at A13.

b. The United States Court of Appeals for the Ninth Circuit affirmed. Pet. App. A1-A15.

The court of appeals, like the district court, held that *Shamrock* controlled the Commerce Clause claim. Pet. App. A6-A6. Although *Shamrock* had addressed California's fortification requirement for fluid milk and its fortification allowance for in-state handlers, not its pricing and pooling requirements for raw milk, the court held that "*Shamrock* broadly refers to the pricing and pooling laws and finds them to be closely related to California's composition requirements and protected from Commerce Clause challenges." *Id.* at A7-A8. The court also viewed the legislative history of 7 U.S.C. 7254 as "demonstrat[ing] that California's pricing and pooling laws were considered to be an important element of California's milk regulatory scheme and necessary to maintain the 'standards of content and purity' for milk." Pet. App. A8 (quoting *Shamrock*, 146 F.3d at 1182). On this basis, the court held that California's raw-milk and fluid-milk regulations are "closely related" and that it "follows that the 1997 amendments which directly affect raw milk, indirectly affect fluid milk." *Id.* at A10.

The court of appeals also affirmed the district court's dismissal of petitioners' claim under the Privileges and Immunities Clause. The court noted that the corporate petitioners could not state such a claim, because the Privileges and Immunities Clause does not protect corporations. Pet. App.

A13. The court then held that the individual petitioners' claim failed because "the classifications the pooling plan amendments create are based on the location where milk is produced," not on "any individual's residency or citizenship." *Id.* at A14.

SUMMARY OF ARGUMENT

I. Congress did not, in 7 U.S.C. 7254, exempt all of California's milk pricing and pooling regulations from the limitations imposed by the Commerce Clause. This Court has repeatedly instructed that such exemptions must be unmistakably clear. There is no indication in the text or legislative history of Section 7254 that Congress intended to immunize any of California's milk regulations from challenge under the Commerce Clause. Moreover, even if Section 7254's reference to "any other provision of law" were understood to encompass the Commerce Clause, Section 7254 would provide an immunity only for the State's regulations governing the composition and labeling of processed fluid milk sold at retail, not for its separate regulations governing the pricing and pooling of raw milk. The lower courts, having erroneously disposed of the Commerce Clause claim based on Section 7254, did not consider the merits of that claim. Accordingly, the Court should remand the case so that the lower courts may consider, in the first instance, whether the California regulations impermissibly discriminate against interstate commerce.

II. California's milk pricing and pooling regulations, unlike most of the state laws that this Court has considered under the Privileges and Immunities Clause, do not discriminate on their face based on state citizenship or residency. The Clause does not, as the court of appeals may have presumed, prohibit only such facially discriminatory laws. The Court in *Chalker* v. *Birmingham & N.W. Ry.*, 249 U.S. 522 (1919), invalidated a state law that did not on its face discriminate based on state citizenship or residency, but drew

distinctions that effectively served as a proxy for state citizenship or residency. The Court's recent decisions have not addressed whether a state law, in order to violate the Clause, must have the purpose, as well as the effect, of discriminating because of state citizenship or residency. That analysis might be informed by the Court's analysis of state laws challenged under the Equal Protection Clause, which also protects individuals against discriminatory action by state governments, and which is violated only when such action is discriminatory in both purpose and effect.

The Court could appropriately avoid addressing any unsettled questions presented by the privileges and immunities claim in this case. If the Court holds that Section 7254 does not provide a Commerce Clause immunity for the regulations at issue here, the lower courts will have to consider the merits of petitioners' Commerce Clause challenge to those regulations, because only the individual petitioners are also asserting a challenge under the Privileges and Immunities Clause. And, if petitioners ultimately prevail under the Commerce Clause, it may be unnecessary ever to reach their claim under the Privileges and Immunities Clause.

ARGUMENT

I. CONGRESS HAS NOT EXEMPTED ALL OF CALIFORNIA'S MILK PRICING AND POOLING REGULATIONS FROM SCRUTINY UNDER THE COMMERCE CLAUSE

Although the Commerce Clause "limits the power of the States to erect barriers against interstate trade," "Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid." *Maine* v. *Taylor*, 477 U.S. 131, 137, 138 (1986). The Court has held, however, that Congress must make any such authorization "unmistakably clear" so as to assure that "all segments of the country are represented" in a decision to allow one State to

affect persons or operations in other States. *South-Cent. Timber Dev., Inc.* v. *Wunnicke*, 467 U.S. 82, 91, 92 (1984). "[A] rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce." *Id.* at 92; accord, *e.g.*, *Wyoming* v. *Oklahoma*, 502 U.S. 437, 458 (1992) ("Congress must manifest its unambiguous intent before a federal statute will be read to permit or to approve * * * a violation of the Commerce Clause."); *Taylor*, 477 U.S. at 139 ("An unambiguous indication of congressional intent is required before a federal statute will be read to authorize otherwise invalid state legislation.").

Section 7254 does not contain any indication at all, much less an "unmistakably clear" one, that Congress intended to immunize the regulations at issue here from Commerce Clause scrutiny. The statutory text does not include any reference either to the Commerce Clause or to California's pricing and pooling laws for raw milk. Nor does the legislative history provide any indication that Congress intended Section 7254 to immunize those laws from scrutiny under the Commerce Clause.

A. Section 7254 Contains No "Unmistakably Clear" Expression Of Congressional Intent To Immunize Any State Law From The Commerce Clause

Section 7254 states that "[n]othing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California" to enact or enforce certain of its own laws. That statutory text does not unambiguously express an intent by Congress to exempt *any* of California's laws from the Commerce Clause. Section 7254 does not even refer to the Commerce Clause specifically, or to the Constitution more generally.

Congress has elsewhere spoken with considerably greater clarity in expressing its intent to immunize state laws from

the implied limitations of the Commerce Clause.[2] More generally, when Congress has sought to refer to the Constitution as well as to other sources of law, Congress has often (although not always) made specific reference to the Constitution.[3]

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[2] See, *e.g.*, 26 U.S.C. 3305(a) ("No person required under a State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce."); 15 U.S.C. 1011 (McCarran-Ferguson Act) ("[S]ilence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of [the] business [of insurance] by the several States."); *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 427 (1946) (describing McCarran-Ferguson as "expressly stat[ing]" Congress's intent to permit certain state regulation and taxation of insurance that the Commerce Clause would otherwise prohibit).

[3] See, *e.g.*, 18 U.S.C. 241 (prohibiting conspiracy to interfere with rights under "the Constitution or laws of the United States"); 18 U.S.C. 242 (prohibiting action under color of law in deprivation of rights protected by "the Constitution or laws of the United States"); 28 U.S.C. 453 (judicial oath to perform faithfully and impartially all duties "under the Constitution and laws of the United States"); 28 U.S.C. 1331 (district court jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States"); 28 U.S.C. 2241(c)(3) (authority to grant writ of habeas corpus to persons "in custody in violation of the Constitution or laws or treaties of the United States"); 33 U.S.C. 1518(a)(1) (applying "[t]he Constitution, laws, and treaties of the United States" to licensed deepwater ports); 42 U.S.C. 1983 (providing civil cause of action for deprivation of rights "secured by the Constitution and laws"); 43 U.S.C. 1333(a)(1) (extending "[t]he Constitution and laws" of the United States to areas of the outer Continental Shelf). Cf. U.S. Const. Art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."); *id.* Art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.").

Moreover, Congress's directive in Section 7254 that no provision of law "shall be construed" in a particular manner is more naturally read as referring only to non-constitutional sources of federal law, *i.e.*, Acts of Congress or agency regulations implementing them. Congress is not ordinarily assumed to have intended to constrain the Judiciary's authority to construe the Constitution. Cf. *City of Boerne* v. *Flores*, 521 U.S. 507, 535-536 (1997) ("[T]he Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is.") (citing *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Thus, if Congress sought to exercise its power under the Commerce Clause to authorize state laws that would otherwise be invalid under that Clause, Congress could reasonably be expected to do so in a straightforward manner by declaring the state laws valid, not to presume to instruct the courts (including this Court) to alter their construction of the Constitution.

Furthermore, if the reference in Section 7254 to "any other provision of law" were read to include the Constitution, it would presumably include provisions of the Constitution beyond the Commerce Clause—such as the Privileges and Immunities Clause of Article IV and the Equal Protection Clause of the Fourteenth Amendment, both of which petitioners also invoked in this case. Congress would have been aware, however, that it cannot, when exercising its authority under the Commerce Clause, immunize state laws from scrutiny under other provisions of the Constitution. See, *e.g.*, *Saenz* v. *Roe*, 526 U.S. 489, 507 & n.21 (1999); *Metropolitan Life Ins. Co.* v. *Ward*, 470 U.S. 869, 883 (1985). Thus, if Congress had intended to provide the California regulations with immunity under the Commerce Clause,

Congress could be expected to have referred more specifically to that Clause.

Nor is there any reason to suppose that Congress intended to authorize California, and only California, to erect barriers to interstate commerce that would otherwise be forbidden by the Commerce Clause. Section 7254 reaches not only California laws in existence at the time of its enactment, but also California laws that might come into existence at some later time. It is particularly unlikely that Congress would have created so open-ended an immunity from the Commerce Clause for whatever laws California might choose to adopt in the future to regulate the marketing of raw or processed milk.

In sum, Section 7254 does not establish, with the requisite degree of clarity, any Commerce Clause immunity for any California law. Rather, Section 7254 is properly understood as protecting certain California laws against preemption only by "this Act" (*i.e.*, the FAIR Act) and other provisions of federal statutory or regulatory law.

B. Section 7254 Does Not Encompass California's Regulations Governing The Pricing And Pooling Of Raw Milk

Section 7254, even if construed to provide a Commerce Clause immunity for some state laws, does not reach the laws at issue here. Neither the text of Section 7254 nor the context in which it was enacted provides any manifestation of congressional intent to protect California's milk pricing and pooling regulations.

1. Section 7254, by its terms, applies only to laws regarding "the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California" and "the labeling of such fluid milk products with regard to milk solids or solids not fat." 7 U.S.C. 7254(1) and (2). The pricing and pooling laws do not regulate, directly or indirectly, fluid-milk content or fluid-milk labeling. They are

thus outside the scope of whatever Commerce Clause exemption Section 7254 even arguably provides.[4]

Congress's decision to confine Section 7254 to a subset of California's milk marketing laws appears to have been quite deliberate. Other provisions of the FAIR Act, of which Section 7254 was a part, demonstrate that, when Congress wanted to refer to California's milk pricing and pooling laws, Congress did so more specifically. In the immediately preceding section of the FAIR Act, Congress authorized the Secretary of Agriculture, "[u]pon the petition and approval of California dairy producers," to "designate the State of California as a separate Federal milk marketing order." 7 U.S.C. 7253(a)(2). Congress further provided that any such "order covering California shall have the right to reblend and distribute order receipts to recognize quota value," *ibid.*, thus referring specifically to the aspect of California's pricing and pooling laws that guarantees state dairy farms with "quota" a higher blend price for their raw milk. See pp. 4-5, *supra*. Presumably, if Congress had wanted Section 7254 to encompass California's pricing and pooling laws, Congress would have referred to those laws with similar specificity.

The court of appeals acknowledged in its predecessor *Shamrock* decision that Section 7254 "does not specifically refer to these [pricing and pooling] laws, as it does to the milk composition standards." 146 F.3d at 1182 (Pet. App. A34). In both this case and *Shamrock*, however, the court concluded that Section 7254 encompasses the pricing and pooling laws as well, reasoning that those laws and the com-

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[4] As noted above (at 3-4), CDFA establishes minimum prices that handlers must pay for various components of raw milk—butterfat, solids-not-fat, and fluid carrier. Even if a regulation that provides for setting a price for the "milk solids" or "solids-not-fat" component of milk could be viewed as a regulation "regarding * * * the percentage of milk solids or solids not fat" in milk, Section 7254 refers to the percentage of those components in "fluid milk," not raw milk.

position and labeling laws are "interrelated and mutually interdependent." Pet. App. A7 (quoting *Shamrock*, 146 F.3d at 1182). The court was mistaken. Even if Congress's express exemption of one state law from the Commerce Clause were understood to extend to "interrelated and mutually interdependent" state laws, no such relationship exists between the fluid-milk composition and labeling laws expressly referred to in Section 7254 and the raw-milk pricing and pooling laws at issue here.

The pricing and pooling laws are not part of the same regulatory program as the composition and labeling laws. The programs are authorized under different divisions of the California Food and Agriculture Code. Compare Cal. Food & Agric. Code § 35784 (West 2001) (composition standards), with *id.* §§ 62061 *et seq.* (minimum prices) and *id.* §§ 62700 *et seq.* (equalization pools). The programs were implemented at different times. And they are administered by different components of the CDFA. See CDFA, *Welcome to California Dairy Programs* (visited Sept. 16, 2002) <http://www.cdfa.ca.gov/dairy> (noting that the milk composition laws are administered by the Milk and Dairy Foods Control Branch, while the milk pricing and pooling laws are administered by the Dairy Marketing Branch and the Milk Pooling Branch). It would be particularly unwarranted in such circumstances to construe Congress's express reference to California's composition and labeling laws for fluid milk as also encompassing California's pricing and pooling laws for raw milk.

2. The context in which Section 7254 was enacted supports the conclusion that it was intended solely to protect California's fluid-milk composition and labeling laws against preemption by federal statutes and regulations. In 1990, Congress enacted the Nutrition Labeling and Education Act of 1990 (NLEA), Pub. L. No. 101-533, 104 Stat. 2362, which prohibits States from setting standards of identity for a food

that are different from the standards set by the FDA. See 21 U.S.C. 343-1(a). In response, out-of-state dairy farms, which had previously complied with the California composition and labeling standards when marketing milk in the State, sought a judicial determination that the NLEA preempted those California standards. The State, in turn, petitioned the FDA for an exemption from the NLEA for its milk composition and labeling standards. See *Shamrock*, 146 F.3d at 1180 (Pet. App. A28).

At the congressional hearings on what was to become the FAIR Act, witnesses asked Congress specifically to exempt the California milk composition and labeling standards from preemption by the NLEA or other federal statutes. For example, Representative Bill Thomas, the only Member of Congress to testify concerning California's milk regulations, urged that those standards be protected against preemption by "national nutritional labeling requirements." *Formulation of the 1995 Farm Bill (Dairy Title): Hearings Before the Subcomm. on Dairy, Livestock, and Poultry of the House Comm. on Agric.*, 104th Cong., 1st Sess. 435 (1995) (*House Hearings*). He did not urge that any of California's other milk regulations, including those governing the pricing and pooling of raw milk, be protected against federal statutory or constitutional challenge. Other witnesses similarly focused on the need to assure that California could continue to enforce its fluid-milk composition standards.[5]

The Conference Report on the FAIR Act confirms that Section 7254 was directed only at the particular problem identified at the congressional hearings. See H.R. Conf. Rep. No. 494, 104th Cong., 2d Sess. 338 (1996). The Conference Report explains that Section 7254 "provides the State

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[5] See, *e.g.*, *House Hearings* 517-518 (prepared statement of A.J. Yates, Deputy Secretary, CDFA); *id.* at 547-548 (prepared statement of James E. Tillison, Alliance of Western Milk Producers); *id.* at 568 (prepared statement of Craig S. Alexander, Dairy Institute of California).

of California an exemption from the preemption provisions of any Federal law respecting standards of identity and labeling for fluid milk," so that California may "fully enforce and apply its fluid milk standards and their attendant labeling requirements to all fluid milk sold at retail or marketed in the State." *Id.* at 338-339. The Conference Report further states that, for these purposes, "fluid milk" means "milk in final packaged form for beverage use." *Id.* at 339. This specific focus refutes the notion that Congress intended to grant a broad Commerce Clause immunity for California laws governing the pricing and pooling of *raw* milk.

The court of appeals, in adopting its more expansive interpretation of Section 7254, did not discuss the Conference Report, which is usually the most authoritative legislative history of an Act of Congress. The court nonetheless purported to find "ample support" in the legislative history—specifically, the testimony of two witnesses at the congressional hearings—for the proposition that "Congress intended that the milk pricing and pooling scheme be included in the exemption." *Shamrock*, 146 F.3d at 1182 (Pet. App. A34); accord Pet. App. A8. Ordinarily, the testimony of two witnesses, only one of whom was a Member of Congress, is an uncertain indication of what Congress as a whole intended. See *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 342 (1982) (noting, when a State sought to sustain its claim of a Commerce Clause exemption based on a single statement on the House floor, that "[r]eliance on such isolated fragments of legislative history in divining the intent of Congress is an exercise fraught with hazards"). Here, moreover, the witnesses' testimony offers no support for the court's interpretation of Section 7254.

For example, Representative Thomas did not, as the court of appeals perceived, "explain[] that the success of California's milk standards is attributable to the state's pricing system." *Shamrock*, 146 F.3d at 1182 (Pet. App. A34). In-

stead, Representative Thomas stated that the success of the California dairy industry was attributable both to the State's "standards for fluid milk products which ensure a high quality product" and to the State's "pricing system for dairy products." *House Hearings* 435. He did not suggest that the composition regulations and the pricing regulations were dependent on each other for their effectiveness. Moreover, even if Representative Thomas had made the statement that the court attributed to him, the statement still would say nothing about any Commerce Clause exemption for the pricing and pooling laws.[6]

In sum, Section 7254 provides no indication that Congress intended to exempt California's pricing and pooling regulations from the Commerce Clause, much less the "unmistakably clear" expression of congressional intent that this Court's decisions require. *South-Cent. Timber*, 467 U.S. at 91. The court of appeals erred in concluding otherwise. Because both the court of appeals and the district court held Section 7254 foreclosed petitioners' Commerce Clause challenge, those courts did not address the underlying merits of that challenge. Nor do petitioners ask this Court to do so in the first instance. In these circumstances, the Court should reverse the court of appeals' judgment insofar as it holds that Section 7254 bars petitioners' Commerce Clause claim and remand the case for consideration of that claim on the merits.

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[6] Similarly, Craig S. Alexander of the Dairy Institute of California, whose testimony was also cited by the court of appeals (see *Shamrock*, 146 F.3d at 1182), discussed the State's milk composition regulations separately from other aspects of its milk marketing program. See *House Hearings* 480-482. He urged "[f]ederal legislation * * * to preserve Ca[illegible]rnia's standards" for the composition of fluid milk products, *id.* at 482, but did not urge legislation to protect the pricing and pooling laws against a federal constitutional or statutory challenge.

II. THE CALIFORNIA REGULATIONS ARE SUBJECT TO SCRUTINY UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE EVEN THOUGH THEY DO NOT FACIALLY DISCRIMINATE ON THE BASIS OF STATE CITIZENSHIP OR RESIDENCY

Petitioners argued below that the 1997 amendments to California's milk pricing and pooling plan also violate the Privileges and Immunities Clause in Article IV of the Constitution. As relevant here, the court of appeals rejected that claim on the ground that "the classifications the pooling plan amendments create are based on the location where milk is produced," and "do not, on their face, create classifications based on any individual's residency or citizenship." Pet. App. A14. To the extent that the court of appeals' ruling rested on the fact that the California regulations do not facially discriminate against citizens or residents of other States, that ruling is incorrect. Under this Court's decision in *Chalker* v. *Birmingham & N.W. Ry.*, 249 U.S. 522, 526-527 (1919), a state law is not exempt from the restrictions imposed by the Privileges and Immunities Clause merely because it does not create distinctions explicitly based on state citizenship or residency. Accordingly, the Court should reverse or vacate the judgment of the court of appeals with respect to the Privileges and Immunities Clause claim and remand for further consideration of that claim to the extent warranted in light of the disposition of petitioners' Commerce Clause claim.

1. The Privileges and Immunities Clause of Article IV provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. Art. IV, § 2. The Clause thereby "place[s] the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned."

Lunding v. *New York Tax Appeals Tribunal*, 522 U.S. 287, 296 (1998) (quoting *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868)). The Clause applies only to natural persons. See *Western & S. Life Ins. Co.* v. *State Bd. of Equalization*, 451 U.S. 648, 656 (1981). Accordingly, as the court of appeals recognized (Pet. App. A13), only the individual petitioners may assert a claim under the Clause. Petitioners do not contend otherwise.

"[O]ne of the privileges which the [Privileges and Immunities] Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." *Supreme Court of N.H.* v. *Piper*, 470 U.S. 274, 280 (1985) (quoting *Toomer* v. *Witsell*, 334 U.S. 385, 396 (1948)). The Clause thus is among the provisions of the Constitution "intended to create a national economic union." *Piper*, 470 U.S. at 280. The Clause, like the Commerce Clause (and certain other constitutional provisions), derived from Article IV of the Articles of Confederation, which stated:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States * * * shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively.

Austin v. *New Hampshire*, 420 U.S. 656, 660 (1975); see *Hicklin* v. *Orbeck*, 437 U.S. 518, 531-532 (1978) (noting "the mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause—a relationship that stems from their common origin in the Fourth Article of the Articles of Confederation and

their shared vision of federalism"). As this Court has recognized, however, the Privileges and Immunities Clause and the Commerce Clause, while addressing closely related concerns, "have different aims and set different standards for state conduct." *United Bldg. & Constr. Trades Council* v. *Mayor of Camden*, 465 U.S. 208, 220 (1984).

The Court has held that, even with respect to state laws that explicitly distinguish between a State's own citizens and citizens of other States, "the privileges and immunities clause is not an absolute." *Toomer*, 334 U.S. at 396. For example, no violation will be found if a State's program of regulation or taxation, considered as a whole, provides a "reasonably fair distribution of burdens" between citizens and non-citizens of the State, at least where "no intentional discrimination has been made against non-residents," *Travellers' Ins. Co.* v. *Connecticut*, 185 U.S. 364, 371 (1902), or where there is "substantial equality of treatment" for citizens and non-citizens, *Lunding*, 522 U.S. at 297. See *Shaffer* v. *Carter*, 252 U.S. 37, 55 (1920). Moreover, "when confronted with a challenge under the Privileges and Immunities Clause to a law distinguishing between residents and nonresidents, a State may defend its position by demonstrating that '(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective.'" *Lunding*, 522 U.S. at 298 (quoting *Piper*, 470 U.S. at 284).

2. All of the state laws that the Court has invalidated under the Privileges and Immunities Clause in its recent decisions discriminated on their face based on state citizenship or residency. See, *e.g.*, *Lunding*, 522 U.S. at 291-292 (state tax law governing treatment of nonresidents' alimony payments); *Supreme Court of Va.* v. *Friedman*, 487 U.S. 59, 62 (1988) (state rule that only state residents could be admitted to state bar without examination); *Piper*, 470 U.S. at 277 n.1

(state rule that only state residents could be admitted to state bar); *Hicklin*, 437 U.S. at 521 (employment preference for state residents); *Austin*, 420 U.S. at 658 n.1 (state tax on "every taxable nonresident" on "New Hampshire derived income"); *Toomer*, 334 U.S. at 389-397 (state law imposing higher fishing license fee on out-of-state residents); cf. *Mayor of Camden*, 465 U.S. at 211 (city ordinance requiring that at least 40% of jobs on city construction projects be reserved for city residents, thereby discriminating not only against residents of other States, but also against residents of the same State who resided outside the city).

The California raw-milk pricing and pooling regulations, in contrast, do not draw any distinction on their face between citizens (or residents) of California and citizens (or residents) of other States. The regulations instead treat *milk* differently depending upon whether the *dairy farm* from which it originates is located inside or outside California. See Pet. App. A14.

A state law is not exempt from scrutiny under the Privileges and Immunities Clause, as the court of appeals may have believed, simply because the law does not distinguish, in so many words, between a State's own citizens or residents and those of other States. In *Chalker*, the Court held that the Privileges and Immunities Clause was violated by a state tax statute that on its face drew distinctions based not on citizenship or residency, but on whether persons maintained the "chief office" of their business inside or outside the State. See 249 U.S. at 526-527. The Court accepted the state supreme court's construction of the statute as imposing the higher tax on all persons, including the State's own citizens, who maintained their chief office outside the State. The Court reasoned, however, that because "the chief office of an individual is commonly in the State of which he is a citizen," the statute, as a "practical[]" matter, "would produce discrimination against citizens of other States." *Id.* at 527.

The Court then concluded that there was no adequate basis for taxing individuals based on the location of their chief office; indeed, the Court viewed the classification as "arbitrary and unreasonable." *Ibid.* Having found no sufficient justification for the statutory distinction between citizens and non-citizens, the Court invalidated the statute under the Privileges and Immunities Clause. *Ibid.*

3. It does not follow from *Chalker* that every state law that might have a disparate impact on individuals who are not citizens or residents of the State implicates the Privileges and Immunities Clause, as petitioners at times appear to suggest. See 01-1018 Pet. 20, 22 (arguing that the relevant consideration is "discriminatory effect"). In *Chalker* itself, for example, the state statute on its face *did* draw an in-state/out-of-state distinction—albeit in terms of the location of a person's chief office, rather than citizenship or residency. The Court, in effect, concluded that the location of the chief office served as a proxy for state citizenship because there was a high correlation between the two. The analysis in *Chalker* would not necessarily apply when the state law in question is neutral on its face, containing no provision that operates as a proxy for state citizenship or residency, but nonetheless having a disparate impact on citizens or residents of other States. In this case, however, the California regulations do draw a distinction based on whether the dairy farm where the milk originates is located inside or outside the State. The regulations consequently bear some resemblance in this respect to the statute in *Chalker*, and petitioners note (01-1018 Pet. 18) the high correlation between the location of a dairy farm and the residence of its individual owner or operator.

It nonetheless is not entirely clear what the inquiry under the Privileges and Immunities Clause should be when a state law does not, on its face, draw distinctions based on state citizenship or residency. In *Chalker* itself, the Court sug-

gested that the Clause reaches laws that "*in their practical operation* materially abridge or impair the equality of commercial privileges secured by the Federal Constitution to citizens of the several States." 249 U.S. at 556-557 (emphasis added). In the decades since *Chalker*, however, the Court has made clear that the Equal Protection Clause of the Fourteenth Amendment reaches only those state laws that have a discriminatory purpose as well as a discriminatory effect. See, *e.g.*, *United States* v. *Armstrong*, 517 U.S. 456, 465 (1996); *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Washington* v. *Davis*, 426 U.S. 229, 242 (1976). Under the Commerce Clause, in contrast, the Court has continued to recognize that in some circumstances a state law may be invalid based on its "practical effect" alone. *Healy* v. *Beer Inst.*, 491 U.S. 324, 336 (1989).

The Court has not had the occasion to consider whether, or to what extent, intervening developments in the Court's approach to evaluating state laws challenged as discriminatory under the Equal Protection Clause should inform its analysis of state laws challenged as discriminatory under the Privileges and Immunities Clause of Article IV. The two Clauses are similar in structure and purpose. Both Clauses explicitly constrain state authority in order to protect persons against discrimination. See, *e.g.*, *Toomer*, 334 U.S. at 395 (characterizing the Privileges and Immunities Clause as a "protection of * * * equality"); *Paul*, 75 U.S. (8 Wall.) at 180 (observing that the Privileges and Immunities Clause, *inter alia*, "inhibits discriminating legislation against [the citizens of each State] by other States," "insures to them in other States the same freedom possessed by the citizens of those States," and "secures to them in other States the equal protection of their laws"); George F. Carpinello, *State Protective Legislation and Nonresident Corporations: The Privileges and Immunities Clause as a Treaty of Nondiscri-*

mination, 73 Iowa L. Rev. 351, 378 (1988) (describing the Privileges and Immunities Clause as "the first 'equal protection' clause in the Constitution," which, "[i]n essence, * * * made distinctions based upon state citizenship inherently suspect"). Indeed, the Equal Protection Clause is coupled in the Fourteenth Amendment with a second Privileges and Immunities Clause, which was modeled after the Clause in Article IV. See *Saenz*, 526 U.S. at 502 n.15.

The Commerce Clause, in contrast, is a structural provision of the Constitution, which is expressly addressed to the powers of Congress, and which only by implication constrains the powers of States. It was not principally designed to protect individual rights, privileges, or immunities. See *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 305, 309, 312 (1992); but cf. *Dennis* v. *Higgins*, 498 U.S. 439, 447 (1991) (persons may bring suit under 42 U.S.C. 1983 to enforce the Commerce Clause). See generally *Mayor of Camden*, 465 U.S. at 220-221 (contrasting Commerce Clause and Privileges and Immunities Clause).

A standard that considered whether a state law has the purpose, as well as the effect, of discriminating based on state citizenship or residency might serve to confine the Privileges and Immunities Clause to its intended function: to remove "from the citizens of each State *the disabilities of alienage* in the other States," *Paul*, 75 U.S. (8 Wall.) at 180 (emphasis added), not all burdens that may incidentally fall more heavily on citizens of other States. Such a focus would also avoid the "far reaching" consequences of a standard that "would raise serious questions about, and perhaps invalidate, a whole range of * * * statutes," *Davis*, 426 U.S. at 248, that do not draw distinctions on their face based on state citizenship or residency, that were not intended to discriminate against citizens or residents of other States, and that would withstand scrutiny under other constitutional provisions (or that have been authorized by Congress under the

Commerce Clause). Cf. *Metropolitan Life Ins.*, 470 U.S. at 899 (O'Connor, J., dissenting) (suggesting, with respect to state economic regulations, that the Court should be reluctant to apply other provisions of the Constitution in a manner that would "foil[] Congress's decision under its commerce powers to 'affirmatively permit [some measure of] parochial favoritism'") (quoting *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 213 (1983)).[7]

It may be particularly appropriate to inquire into the existence of a discriminatory purpose when, unlike here, a state law does not on its face contain *any* in-state/out-of-state classification that might operate as a proxy for a state citizenship or residency classification. Even where, however, a state law, like the California regulations here, does contain an in-state/out-of-state classification, whether the law was adopted for the purpose of disadvantaging citizens or residents of other States may still be a relevant consideration. Cf. *Travellers' Ins. Co.*, 185 U.S. at 371.[8]

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[7] The state law in *Chalker* might well have been found invalid under a privileges and immunities analysis that focused on discriminatory purpose. As the Court has since explained in the equal protection context, "[s]ome activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed." *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) (offering as an example that "[a] tax on wearing yarmulkes" could be equated with "a tax on Jews"); see *Davis*, 426 U.S. at 242 (observing that discriminatory purpose may be inferred from discriminatory impact in circumstances where such impact "is very difficult to explain on nonracial grounds"). The classification created by the statute in *Chalker*, which based tax burdens on the location of a person's chief office, might have been regarded as sufficiently suggestive of a purpose to discriminate against citizens of other States.

[8] It is far from clear that petitioners could ultimately establish that a motivating purpose of the California regulations was to place the State's own citizens at an advantage over citizens of other States. Nothing in

4. There is no need at this stage of the case for the Court to resolve these and other unsettled questions that may arise concerning the application of the Privileges and Immunities Clause to California's milk pricing and pooling regulations. In this Court, the individual petitioners have focused their arguments, at least at the petition stage, on whether the Clause may be violated by a law that does not facially discriminate based on state citizenship or residency. See 01-1018 Pet. i, 17-23. It therefore appears that they do not seek to have the Court resolve the merits of their privileges and immunities claim at this time, but instead seek to have the Court make clear that facial discrimination against citizens or residents of other States is not required and remand the claim for further consideration on the merits by the lower courts. That, in the view of the United States, would be an appropriate disposition.

If the Court adopts the construction of 7 U.S.C. 7254 that the United States urges in Point I of this brief, the lower courts will have to consider the merits of the Commerce Clause claim on remand, whatever might be the proper dis-

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those regulations or any other provision of California law prohibits citizens of other States from owning dairy farms in California. And, when citizens of other States *do* own dairy farms in California, the milk produced at those dairy farms is treated identically to milk produced at California dairy farms owned by California citizens. For example, all such dairy farms, regardless of the citizenship of their owners, are equally entitled to receive guaranteed minimum prices for their raw milk from California handlers. And all such dairy farms are equally eligible to acquire "quota." By the same token, all raw milk produced at dairy farms outside California is treated identically, whether the dairy farm is owned by citizens of California or citizens of other States. Indeed, the petitioners in this case include a California corporation and two California partnerships (with some or all California partners), which complain about the impact of the California regulations on raw milk produced at the dairy farms that they operate in Nevada. See Amended Complaint 2-3, *Ponderosa Dairy* v. *Veneman*, No. CV-S-97-1185 GEB JFM (Appellants' C.A. E.R. Tab 5); Br. in Opp. 17-18.

position of the Privileges and Immunities Clause claim. That is so because many of the petitioners, as artificial persons outside the reach of Privileges and Immunities Clause, are no longer pressing a claim under that Clause, and thus would not benefit from any ruling on that claim in favor of those petitioners who are natural persons. If the lower courts on remand conclude that the challenged regulations violate the Commerce Clause, then there may be no need to resolve the application of the Privileges and Immunities Clause. And, in any event, the court of appeals' analysis under the Commerce Clause of whether any differing treatment of raw milk produced outside California is sufficiently justified to be sustained under that Clause, as respondents have suggested (see Br. in Opp. 6-8, 11-12), might inform the analysis under the Privileges and Immunities Clause with respect to such questions as (1) whether the milk pricing and pooling plan, considered as a whole, provides a "reasonably fair distribution of burdens," *Travellers' Ins. Co.*, 185 U.S. at 371, and results in "substantial equality" between citizens and non-citizens of the State, *Lunding*, 522 U.S. at 297, and (2) whether any difference in treatment is justified by a "substantial reason" and "bears a substantial relationship to the State's objective," *id.* at 298. Any further consideration of the individual petitioners' privileges and immunities claim therefore would most appropriately be left to the lower courts in the first instance.

CONCLUSION

The judgment of the court of appeals holding petitioners' claim under the Commerce Clause to be foreclosed by 7 U.S.C. 7254 should be reversed and that claim should be remanded for consideration on the merits. The judgment of the court of appeals with respect to the individual petitioners' claim under the Privileges and Immunities Clause should be reversed or vacated and remanded for further consideration to the extent appropriate.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
BARBARA MCDOWELL
Assistant to the Solicitor General
MARK B. STERN
ARA B. GERSHENGORN
Attorneys

FEBRUARY 2003

Nos. 01-950, 01-1018

FEB 24 2003

In The
Supreme Court of the United States

HILLSIDE DAIRY INC., A&A DAIRY, L&S DAIRY, AND MILKY WAY FARMS,

Petitioners,

v.

WILLIAM J. LYONS, JR., SECRETARY, DEPARTMENT OF FOOD & AGRICULTURE, STATE OF CALIFORNIA, AND ROBERT TAD BELL, UNDERSECRETARY, DEPARTMENT OF FOOD & AGRICULTURE, STATE OF CALIFORNIA,

Respondents.

PONDEROSA DAIRY, PAHRUMP DAIRY, ROCKVIEW DAIRIES, INC., AND DARREL KUIPER AND DIANE KUIPER, d/b/a D. KUIPER DAIRY,

Petitioners,

v.

WILLIAM J. LYONS, JR., SECRETARY, DEPARTMENT OF FOOD & AGRICULTURE, STATE OF CALIFORNIA, AND ROBERT TAD BELL, UNDERSECRETARY, DEPARTMENT OF FOOD & AGRICULTURE, STATE OF CALIFORNIA,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF STATES OF NEVADA, MINNESOTA, MONTANA, OREGON, WASHINGTON AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF PETITIONERS

BRIAN SANDOVAL*
Attorney General,
State of Nevada
100 North Carson Street
Carson City, Nevada 89701
(775) 684-1100

**Counsel of Record*

Attorney for Amicus Curiae State of Nevada

[Counsel Listed On Inside Front Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MIKE HATCH
Attorney General,
State of Minnesota
102 State Capitol
75 Dr. Martin Luther King Jr. Blvd.
St. Paul, Minnesota 55155
(615) 296-6196

Attorney for Amicus Curiae State of Minnesota

MIKE MCGRATH
Attorney General,
State of Montana
215 North Sanders Street
P.O. Box 201401
Helena, Montana 59620
(406) 444-2026

Attorney for Amicus Curiae State of Montana

HARDY MYERS
Attorney General,
State of Oregon
1162 Court Street NE
Salem, Oregon 97301
(503) 378-6002

Attorney for Amicus Curiae State of Oregon

CHRISTINE O. GREGOIRE
Attorney General,
State of Washington
1125 Washington Street
P.O. Box 40100
Olympia, Washington 98504
(360) 753-6200

Attorney for Amicus Curiae State of Washington

PEGGY A. LAUTENSCHLAGER
Attorney General,
State of Wisconsin
114 East State Capital
Madison, Wisconsin 53707
(608) 266-1220

Attorney for Amicus Curiae State of Wisconsin

QUESTION PRESENTED

Amici will address the following question:

Whether 7 U.S.C. § 7254 exempts California's pricing and pooling regulations from scrutiny under the Commerce Clause.

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BRIEF OF STATES OF NEVADA, MINNESOTA, MONTANA, OREGON, WASHINGTON AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF PETITIONERS

The States of Nevada, Minnesota, Montana, Oregon, Washington and Wisconsin hereby file the following Brief of Amici Curiae in Support of Petitioners.

INTERESTS OF AMICUS CURIAE

The States of Nevada, Minnesota, Montana, Oregon, Washington and Wisconsin have an interest in maintaining orderly marketing conditions and the reasonable stability of production of raw milk, in order to ensure that fresh local supplies of raw milk are available year-round to meet the fluid milk demand in their respective states. Pursuant to Supreme Court Rule 37.4, by and through their Attorneys General, the above-named States submit this Amicus Curiae Brief in support of Petitioners' efforts to reverse the summary judgment entered against Petitioners by the District Court and affirmed by the United States Court of Appeals for the Ninth Circuit.

The interests of each state joining this brief vary slightly, but at the core, each of these states support the reversal and remand of the lower court ruling that § 144 of the Federal Agriculture Improvement and Reform Act of 1996 (hereinafter "1996 Farm Bill") (codified at 7 U.S.C. § 7254) provides California's three separate milk regulation programs with blanket immunity from the dormant Commerce Clause. It is because the law so clearly demonstrates the error of the Ninth Circuit's affirmance of the District Court's finding that a blanket Commerce Clause

exemption exists, that our states have concluded that we can address the straightforward legal issue, while also demonstrating the interests of these several states in the outcome of this litigation, without unduly burdening the resources of this Court with multiple briefs.

As discussed more fully below, the income of every dairy farmer from the border states of Oregon and Nevada to the Midwestern states of Minnesota and Wisconsin is adversely affected by California's expanding production of milk and dairy products. If California's expansion were due to good competition and ingenuity, the States would not be filing this brief. However, in recent years, in order to compensate for losing the luxury of "geographic isolation," California has begun to employ policies that are prohibited by the Commerce Clause. These policies have provided the California dairy industry with an improper competitive advantage over the dairy economies of every other state in the commercial union.

Nevada and Oregon dairy farmers who directly engage in raw milk transactions with California, are faced with direct interference by California in their economic transactions with California processors. In addition, California's protectionist policies subsidize and encourage milk production that is not tempered by the law of supply and demand. As a result, for the rest of the signatory states (as well as the border states), overproduction by California dairy farmers is depressing the prices received by their dairy farmers. Even if the 1997 amendments are not ultimately found to violate the dormant Commerce Clause, the signatory states have an interest in preventing the judicial expansion of § 144 of the 1996 Farm Bill. The specific interests of the signatory states are as follows:

A. States Whose Dairy Farmers Directly Engage in Raw Milk Transactions With California Processors Will Be Injured If California Is Permitted To Insulate California Dairies From Interstate Milk Competition.

Nevada has declared a public interest in the production and distribution of fluid milk. NRS 584.390. In the exercise of its police powers and in furtherance of the health and welfare of its citizens, Nevada enacted legislation for the stabilization and marketing of fluid milk. NRS 584.325 to NRS 584.690 inclusive. Nevada enacted this legislation to ensure an in-state supply of fresh milk for Nevada citizens and also to ensure a competitive market for Nevada dairy farmers.

Nevada is interested in this matter because the 1997 amendments to California's pooling plan enacted by the California Department of Food and Agriculture (hereinafter "CDFA"), impose a discriminatory burden on Nevada dairy farms such that Nevada's goals of promoting the production and marketing of fluid milk through unburdened interstate competition are adversely affected.

Nevada's dairy producers are directly affected because those dairies transport their raw milk to California for processing and the price those dairies receive from the California processors for the raw milk is now controlled by California's economic pooling and pricing regulations. California's economic pooling and pricing regulations treat out-of-state producers differently than in-state producers. In-state California producers receive a guaranteed uniform minimum price for all the milk they produce. Out-of-state producers do not. In-state California producers receive the true benefits of California's economic pooling system (the means by which producer revenue is shared

and distributed). Out-of-state producers do not. (Gruebele Supp. Aff. ¶ 25, C.A. E.R. Tab 11N at 9).[1] Thus, the 1997 amendments enacted by CDFA discriminate against out-of-state producers and have harmed and will continue to harm Nevada consumers and Nevada dairy farms.

Specifically, Nevada opposes the Ninth Circuit's overbroad interpretation of § 144 of the 1996 Farm Bill that suggests that California somehow has been granted the right to directly burden and discriminate against Nevada dairies in this manner or in any other matter in the future. Although the court did not analyze the arguments pertaining to whether or not the 1997 amendments violated the Commerce Clause, Petitioners provided the court with undisputed evidence that CDFA adopted the 1997 amendments with the intent of discouraging shipments of raw milk from out-of-state (Dorbin Aff. ¶ 6, C.A. Supp. E.R. Tab 4 at 1-2),[2] and demonstrated that the 1997 amendments imposed direct, differential and discriminatory burdens on out-of-state dairy farmers. (Gruebele Aff. at 6, lines 4-9 and at 8-9, ¶¶ 1-7, C.A. E.R. Tab 11M at 6, 8-9. Gruebele Supp. Aff. ¶¶ 25 and 28, C.A. E.R., Tab 11N at 11-12).

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[1] Citations to "C.A. E.R." are to the Hillside and Ponderosa Appellants' Joint Excerpts of Record filed in the United States Court of Appeals for the Ninth Circuit on December 23, 1999 (Nos. 16981, 16982).

[2] Citations to "C.A. Supp. E.R." are to the Hillside and Ponderosa Appellants' Joint Supplemental Excerpts of Record filed in the United States Court of Appeals for the Ninth Circuit on April 10, 2000 (Nos. 16981, 16982).

If allowed to stand, the court's ruling would open the door for destructive trade practices. Pursuant to the court's ruling, California could completely ban the sale of Nevada milk. For example, CDFA could make a processor's pool contribution on out-of-state milk so prohibitive that California processors could no longer afford to receive milk from out-of-state. See, Brief of Amicus Curiae in Support of Petition for Writ of Certiorari by the Dairy Institute of California.

California is a natural market for Nevada raw milk. In many cases, raw milk produced in Nevada is shipped to California for processing and actually returned to Nevada in packaged form for consumption. (Witt Decl. ¶¶ 4-5, C.A. Supp. E.R. Tab 1 at 2). Based on statistics received from the Nevada Dairy Commission, in 2001 and 2002, Nevada dairy producers shipped 32,835,829 and 39,506,747 pounds of raw milk to California. This amounted to 68% in 2001 and 78% in 2002 of Nevada's total milk production.

Before the 1997 amendments, it was economical and competitive for Nevada dairies to transport raw milk to California for processing before the finished dairy product was eventually transported back to Nevada for consumption. Because of this mutually beneficial arrangement, Nevada dairies relied to their detriment on the unburdened lanes of commerce and Nevada did not develop in-state raw milk processing plants. In addition, several dozen Nevada dairies invested in the development of markets in California instead of alternative markets. *See e.g.*, (Witt Decl. ¶¶ 4-5, C.A. Supp. E.R. Tab 1 at 2). Now, after the enactment of the protectionist 1997 amendments, and the Ninth Circuit's interpretation of § 144 of the 1996 Farm Bill, Nevada dairies are earning less income, California in-state dairies are receiving more money in their

pooling checks, and the health of Nevada's dairy industry is at risk because California's dairy industry is free to engage in economic protectionism having been insulated from Commerce Clause challenge. (Witt Decl. ¶ 12, C.A. Supp. E.R. Tab 1 at 2; Olsen Decl. ¶ 8, C.A. Supp. E.R., Tab 2 at 2).

Today, under the court's ruling, CDFA has the authority to make it economically infeasible to continue to ship the above-stated quantities of milk to California. If CDFA takes these steps, then many of Nevada's producers will go out of business, leaving Nevada without a local supply of fresh milk.

This type of harm has already occurred. One of the petitioners, Milky Way Farms, closed its business as a result of the burdens on interstate commerce placed by CDFA. (Witt Decl. ¶¶ 15-16; C.A. Supp. E.R., Tab 1 at 3).

Perhaps more important, while discouraging milk shipments from out-of-state dairies, California has encouraged its in-state dairy producers to expand production. Testimony of Dr. Robert Yonkers before U.S. Dept of Agric. Law Judge James W. Hunt, Hearing on Class III and IV Prices, Transcript at 256 (May 8, 2001) *available at*<http://www.ams.usda.gov/dairy/exh_hear.htm>(showing explosive growth in California milk production relative to other states between 1980 and 1999). By this action, California has depressed milk and milk product prices nationwide, thereby causing farm foreclosures and milk cow slaughter. Economic Research Service, USDA, *Livestock, Dairy & Poultry Outlook*/LDP-M-98/August 15, 2002 at 6 <www.ers.usda.gov/publications/so/>; National Agricultural Statistics Service (NASS), USDA, *Milk Production* (monthly 1997-2002) www.usda.gov/nass/; NASS,

USDA, *U.S. Dairy Herd Structure* (Sep. 26, 2002) <http://jan.mannlib.cornell.edu/reports/nassr/livestock/dairy-herd/specda02.pdf>; Kenneth Baily, *Dairy Market Outlook* (Pennsylvania State University (Nov. 22, 2002) <http://dairyoutlook.aers.psu.edu> ("More milk, more cheese, more butter, and lower milk prices!").

Nevada is interested in preserving the benefits of unobstructed commerce between states including California and Nevada. Nevada takes seriously the mandate of the dormant Commerce Clause and endeavors to promulgate and administer regulations in a manner that does not place parochial interests ahead of national interest in unobstructed interstate commerce.

B. States That Do Not Regularly Engage in Raw Milk Transactions With California Are Nevertheless Directly and Adversely Impacted If California Is Permitted To Insulate California Dairies From Interstate Milk Competition.

Like Nevada and Oregon, the other amici states also have declared public interests and enacted legislation in support of their state dairy industries. *See, e.g.,* Minn. Stat. sec. 17.03, subd. 1 (2002); Mont. Code Anno., § 81-23-102 (2001); Rev. Code Wash. (ARCW) § 15.44.900 (2001); Wis. Stat. §§, 93.07(17), 93.40 and 165.09.

Every state with a dairy industry outside of the state of California is directly and adversely impacted by California's economic pooling and pricing regulations in an important way additional to the harm suffered by states that engage in direct raw milk transactions, such as Nevada and Oregon. Major dairy states, like Minnesota and Wisconsin, as well as each of the other states joining

this brief, have experienced the harmful effects of California's increasingly overt acts to insulate California's dairy industry from interstate milk competition.

California now leads the country in milk production. California produced 58% more milk in 2002 than the second leading dairy state, Wisconsin. California increased its milk production by 157% between 1980 and 2002, similarly, while total United States milk production increased only 35% during the same period. Crop Reporting Bd., Statistical Reporting Serv., U.S. Dept. of Agric., Milk: Final Estimates for 1979-82, Statistical Bulletin No. 722, at 27; National Agric. Statistics Service, Agric. Statistics Bd., U.S. Dept. of Agric., Milk Production, at 2 (Feb. 14, 2003).

California's protectionist approach to its milk pooling and pricing regulations allows it to distort national forces of supply and demand and competition. Because California so dominates the United States dairy economy, its ability to protect its dairy industry de facto shifts economic burdens of supply and demand onto its competitor dairy states.

This occurs because of the complex regulatory mechanisms that govern milk pricing and pooling. The interstate nature of the dairy industry necessitated the intervention of federal law to regulate the dairy industry in the 1930's. That is even more true today due to the extensive interstate movement of milk and dairy products. Now, however, the national impact of California's localized regulatory scheme is exacerbated by the fact that the United States Department of Agriculture (hereinafter, "USDA") regulates minimum farm milk prices in most states through the federal milk marketing order program authorized under the Agriculture Marketing Agreement Act of 1937, 7

U.S.C. 601 *et seq.* (the "Agriculture Marketing Act"): in 2002, 73% of all United States milk.

Specifically, the protective web of California's regulations allows California producers to price their milk used in nationally marketed cheese and butter significantly lower than required under the federal milk marketing orders that govern pricing in other dairy states. Conversely, California milk used in regionally marketed fluid milk products is priced relatively higher than federal milk marketing orders dictate. The result of California's system of cross-subsidization therefore has been to increase milk production beyond what uniformly regulated conditions would have generated. More milk production means more cheese and butter, and, thus lower prices for those products and for milk on which dairy farmers throughout the country rely for their livelihoods.

California designed its milk pricing program to maintain misalignment. California's objective is evidenced by the 1997 ratemaking decision from which the present case originates, where California Undersecretary of the Department of Food and Agriculture A.J. Yates stated, "*[I]t is beneficial to the California dairy industry to maintain its comparative advantage in selling manufactured dairy products.*" Statement Of Determination And Order Of The Secretary Of Food And Agriculture Regarding Proposed Amendments To The Stabilization And Marketing Plans For Market Milk For The Northern And Southern California Marketing Areas Based Upon A Public Hearing Held On September 3, 1997 (Calif. Dept. of Food & Agric. Oct. 10, 1997) (App., *infra*, 2-3). Yates' statement documents California's deliberate design to use its pooling and pricing program for competitive advantage.

The most egregious aspect of California's protectionist regulatory scheme is the fact that federal milk prices established by USDA must be aligned, by design or by default, with those of California. If USDA fails to design milk pricing in relation to California, other states governed by those USDA regulations lose market share to California. Agri-Mark Dairy Cooperative, Comments of Agri-Mark Dairy Cooperative at 6 (Jan. 25, 2002) <http://www.ams.usda.gov/dairy/rec_dec/comment_12.pdf>.

Even if USDA chooses to align its regulated milk prices for cheese and butter uses with California's regulated prices, then USDA must bottom out prices to California levels at the expense of all United States dairy farmers. By design or by default, as a result, the 89,490 dairy farmers in other states suffer significant economic hardship each year from lower milk prices driven by California's industry dominance and protectionism. National Agric. Statistics Service, Agric. Statistics Bd., U.S. Dept. of Agric., Milk Production, at 16 (Feb. 14, 2003).

For example, USDA held public hearings in May 2000 to consider amendments to the milk order price formulas for Class III milk (used in cheese) and Class IV milk (used in butter and nonfat dry milk). In January 2001, the revised formulas issued by the USDA were subsequently enjoined by a U.S. District Court pursuant to legal challenge which argued that the revised formulas raised the Class III price too high relative to the California regulated price. *Select Milk Producers, Inc. v. Glickman*, No. 01-CV-60 (D.C. Jan. 31, 2001). In its subsequent final rule, USDA significantly lowered Class III prices to reduce the Class III price gap between the federal order and the California regulation. Milk in the Northeast and Other Marketing Areas, 67 Fed. Reg. 67,906 (Nov. 7, 2002) (to be codified at

7 C.F.R. pts. 1000, 1001, 1005, 1006, 1007, 1030, 1032, 1033, 1124, 1126, 1131, and 1135); Milk in the Northeast and Other Marketing Areas, 68 Fed. Reg. 7,063 (Feb. 12, 2003).

The crux of the present case, therefore, is to end California's ability – now and in the future – to hide behind a clearly erroneous and illegal Commerce Clause exemption and to end the resulting unfair competitive effects on other dairy producing states. Any interpretation of § 144 of the 1996 Farm Bill to exempt California from the Commerce Clause will simply allow California to continue its conscious and deliberate attempt to cross-subsidize between fluid and manufacturing milk prices in order to encourage the expansion of its cheese and other dairy product manufacturing to the detriment of other dairy states.

SUMMARY OF ARGUMENT

Section 144 of the 1996 Farm Bill provides:

> Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding:
>
> (1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or
>
> (2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

Nothing in the text of this statute grants the three separate programs involved in California's milk regulation

system immunity from Commerce Clause scrutiny. Even if a Commerce Clause exemption has been granted, neither the language in § 144 of the 1996 Farm Bill, nor any expression articulated by Congress evidences an intention to extend the perceived exemption to "pooling and pricing" laws. An exemption respecting standards of identity (pertaining to nutritional content) and labeling is unrelated to pooling and pricing laws that are clearly economic regulations. Indeed, the California program that regulates the identity and labeling of processed and packaged fluid milk products is in a different program than the two programs that regulate the pooling and pricing of raw milk, much like the federal government regulates milk product composition through the Food and Drug Administration while milk economic regulations are administered by the U.S. Department of Agriculture.

It is the overbroad interpretation of § 144 to include "pooling and pricing" laws, first articulated by Judge Reinhardt in *Shamrock Farms v. Veneman*, 146 F.3d 1177 (9th Cir. 1998), that allows CDFA to implement discriminatory, protectionist laws that burden interstate commerce between California and Nevada, Minnesota, Montana, Oregon, Washington, and Wisconsin.

The issue raised in this case is whether the § 144 exemption allows California to discriminate in favor of California dairy producers to the economic disadvantage of other state dairy producers. If § 144 provides any Commerce Clause exemption at all, the holding in *Shamrock* should be limited to exemptions for milk composition and labeling and not expanded to allow exemptions for economic "pooling and pricing" regulations.

ARGUMENT

Every state in the commercial union has an interest in unburdened interstate trade, as guaranteed by the U.S. Constitution. Thus, to guarantee unburdened interstate trade, each amicus state strongly opposes the judicial expansion of § 144 of the 1996 Farm Bill to confer blanket Commerce Clause immunity to all three of California's separate milk regulation programs. The court's overly broad interpretation of § 144 is improper and should be reversed because that holding has placed and threatens to place additional impermissible burdens on the interstate commerce of raw milk.

The Commerce Clause authorizes Congress to regulate commerce among the several states. U.S. Const. Art. I, § 8, cl.3. When Congress fails to exercise the full extent of its power to regulate interstate commerce, states are free to regulate if their regulations are not discriminatory in nature, or impose undue burden on interstate commerce. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980).

Although the Commerce Clause "limits the power of the States to erect barriers against interstate trade," "Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid." *Maine v. Taylor*, 477 U.S. 131, 137, 138 (1986). If state regulations are nothing more than economic protectionism they are invalid. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981). Even when state regulation imposes only an incidental burden it can still be unconstitutional if it imposes an excessive burden on interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

The court's overbroad interpretation of § 144 first announced in *Shamrock Farms v. Veneman*, 146 F.3d 1177

(9th Cir. 1998) should be reversed because: (1) the text of § 144 did not grant California any exemption at all from Commerce Clause scrutiny; and (2) Congress did not make the perceived Commerce Clause exemption "unmistakably clear."

1. The text of § 144 did not grant California any exemption at all from Commerce Clause scrutiny.

Section 144 does not grant California any immunity from Commerce Clause scrutiny for any of CDFA's laws and regulations. This understanding is based upon the text of the statute at issue. Specifically, § 144 provides:

> Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding:
>
> (1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or
>
> (2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

There is no mention of the Commerce Clause anywhere in this statute. Indeed, if we read § 144 in the context of the statute within which it is found, the language grants California an exemption in regards to any law, regulation, or requirement found within "this Act" or in other words, the 1996 Farm Bill.

While it is true the Act provides an exemption for "any other provision of law," there is no precedent for

construing "any other provision of law" as anything other than a reference to other statutory law.

Each state respects the Commerce Clause and the original intent of the framers of the Constitution to prohibit individual states from placing burdens on interstate commerce to protect their own industries. Certainly, any immunity from Commerce Clause scrutiny that would allow one state to harm or burden other states should be express and not inferred. However, § 144 does not mention any Constitutional immunities, nor any Commerce Clause immunities. There is no precedent for construing "any other provision of law" as anything other than a reference to other statutory law. Even if this language could also be construed to mean the Constitution, treaties and judicial decisions, it would then, at best, be ambiguous, and for that reason also fail to grant Commerce Clause Immunity. Accordingly, under the clear text of the statute, and by an absence of any granting text, California's claim to a Commerce Clause immunity should be denied, and the court's overbroad interpretation of the statute granting the same should be reversed.

2. Even assuming that § 144 granted Commerce Clause immunity for some California laws, that immunity was not granted to the economic "pooling and pricing" regulations because Congress did not make the perceived Commerce Clause exemption "unmistakably clear."

Because of the important role the Commerce Clause plays in protecting the free flow of interstate trade, this Court has exempted state statutes from the implied limitations of the Clause only when the congressional

direction to do so has been "unmistakably clear." *Maine v. Taylor*, 477 U.S. 131, 138-39 (1986).

This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992). When the words of a statute are unambiguous, the judicial inquiry is complete.

As provided above, the language of the statute provides exemption for milk composition (nutrition) and labeling standards. Nothing in the text of § 144 appears to grant California an exemption for economic pooling and pricing regulations. This is reinforced by the fact that § 144 directly addresses regulations for a specific kind of milk – packaged (meaning necessarily processed) fluid milk. Whereas, the pooling and pricing regulations deal with a different kind of milk – raw unprocessed milk that is used to make more than just fluid milk.

In keeping with this Court's admonition to give effect to the plain meaning of statutes, California's exemptions should be limited to the unambiguous words contained in the statute. The statute unambiguously provided exemptions for milk composition (nutrition) and labeling standards only. As such, § 144 cannot possibly be extended to provide California with exemptions for economic pooling and pricing regulations that are not provided in the statute.

The court's overbroad interpretation of § 144 should be reversed because there is no unmistakable, clear language from Congress to support the court's interpretation.

CONCLUSION

California's economic pooling and pricing regulations discriminate against out-of-state dairy farmers and violate the Commerce Clause. This was the stated intent of the drafters of the 1997 amendments. To shield these regulations, that would otherwise be struck down as unduly burdening commerce between the states, California relies upon a perceived exemption from the Commerce Clause.

The District Court decision and the Ninth Circuit Court affirmation of that decision allowing California such Commerce Clause immunity should be reversed and the matter remanded because Congress granted no such immunity. To allow California to continue enacting protectionist laws and regulations shielded from Commerce Clause scrutiny harms the interstate commerce between several states and California.

Respectfully submitted,

BRIAN SANDOVAL*
Attorney General,
State of Nevada
100 North Carson Street
Carson City, Nevada 89701
(775) 684-1100

**Counsel of Record*

Attorney for Amicus Curiae State of Nevada

MIKE HATCH
Attorney General,
State of Minnesota
102 State Capitol
75 Dr. Martin Luther King Jr. Blvd.
St. Paul, Minnesota 55155
(615) 296-6169

Attorney for Amicus Curiae State of Minnesota

MIKE MCGRATH
Attorney General
State of Montana
215 North Sanders Street
P.O. Box 201401
Helena, Montana 59620
(406) 444-2026

Attorney for Amicus Curiae State of Montana

HARDY MYERS
Attorney General,
State of Oregon
1162 Court Street NE
Salem, Oregon 97301
(503) 378-6002

Attorney for Amicus Curiae State of Oregon

CHRISTINE O. GREGOIRE
Attorney General,
State of Washington
1125 Washington Street
P.O. Box 40100
Olympia, Washington 98504
(360) 753-6200

Attorney for Amicus Curiae State of Washington

PEGGY A. LAUTENSCHLAGER
Attorney General,
State of Wisconsin
114 East State Capital
Madison, Wisconsin 53707
(608) 266-1220

Attorney for Amicus Curiae State of Wisconsin

February 24, 2003

September 3, 1997 Hearing Results

STATEMENT OF DETERMINATION AND ORDER OF THE SECRETARY OF FOOD AND AGRICULTURE REGARDING PROPOSED AMENDMENTS TO THE STABILIZATION AND MARKETING PLANS FOR MARKET MILK FOR THE NORTHERN AND SOUTHERN CALIFORNIA MARKETING AREAS BASED UPON A PUBLIC HEARING HELD ON SEPTEMBER 3, 1997

SUMMARY: The determination to make amendments to the current Stabilization and Marketing Plans for Northern and Southern California (Plans) is based on testimony and evidence received at a public hearing held on September 3, 1997 in Fresno, California. These determinations are further based on written comments submitted prior to the close of the hearing record. The statement of determination will be discussed in the following Sections:

I. Introduction: a broad outline of statutes and facts giving rise to the hearing.

II. Background: an overview of regulation of the dairy industry.

III. Statutory Criteria for Establishing and Amending the Stabilization and Marketing Plans and the Pooling Plan: an analysis of the criteria set forth in the Food and Agricultural Code for establishing or amending the Stabilization and Pooling Plans.

IV. Current Industry Conditions Relative to the Statutory Criteria: Current information concerning the condition of the dairy industry in California.

V. Proposals and Testimony: a review of the hearing record.

VI. Review of Previous Hearings: a review of the last hearings held on this topic and the determinations made as a result of those hearings.

VII. Analysis of the Hearing Record: a discussion of the changes to the Plans as proposed in the hearing record.

VIII. Findings of the Department of Food and Agriculture.

IX. Order of the Secretary of Food and Agriculture.

SECTION I

* * *

rather conservative approach to making changes in pricing policy for the time being.

Class 1, 2 and 3 dairy product markets are regional in scope. If Class 1, 2 and 3 farm prices are too high, the competition to replace California products would be limited to milk supply areas in the West. Classes 4a and 4b utilize 66 percent of all pooled milk. Classes 4a and 4b perform important market clearing functions. Class 4a and 4b products compete on a national and international market. Thus, setting appropriate Class 4a and 4b prices is extremely important.

California produces more milk than any other state. It has a dominant position as the nation's supply leader. California has a steady trend of continual production increases, with the amount of the annual increase larger than the total production of many other states. Thus, it is beneficial

to the California dairy industry to maintain its comparative advantage in selling manufactured dairy products. To do otherwise would reduce California's comparative advantage to the benefit of out-of-state processors.

Those supporting higher Class 4a and 4b prices and lower manufacturing cost allowances argue that total production would be forced downward by the curtailment of processing plant capacity. The experience of the 1980's has demonstrated that California farmers will produce the maximum milk needed to fulfill the fall and winter needs (normal seasonal peak in commercial demand, and seasonal low in production) and will ship surplus milk production (amount in excess of processing capacity) to out-of-state Class 4a and 4b processors at less than federal or state minimum prices in the spring and summer (seasonal low in commercial demand and high in milk production).

By doing so, California dairy farmers maximize their total revenues, but also provide ample milk supplies at lower cost to out-of-state processors. The out-of-state processors who received the surplus milk are afforded a cost advantage to compete in the national market. The result puts added pressure on lowering national milk prices.

Given its comparative economic advantages in milk production, it is not mere coincidence that California has grown into the largest dairy state in the nation while its minimum milk prices have been lower than the other major milk production regions of the country. California's basic commodities have largely been successful in the national market based on their ability to compete in price. Barring fundamental changes in the near future, the viability of the California dairy industry's future remains with its ability to compete. Until milk production levels

remain constant or the California dairy industry becomes more reliant on value added products, this will not change.

It makes little economic sense to raise the raw product to the point that the California products manufactured from California milk cannot be sold or must be sold at an economic loss. California dairy farmers would lose in the long run.

Summary

The Departmental determinations are compared with the various industry proposals in *Attachment A-1* and summarized below:

Changes Rejected:

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(12) (10)

Nos. 01-950, 01-1018

Supreme Court, U.S.
FILED
FEB 24 2003
CLERK

In the Supreme Court of the United States

HILLSIDE DAIRY, INC., A&A DAIRY, L&S DAIRY, and MILKY WAY FARMS,

Petitioners,

v.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, and ROBERT TAD BELL, Undersecretary, Department of Food & Agriculture, State of California,

Respondents.

PONDEROSA DAIRY, PAHRUMP DAIRY, ROCKVIEW DAIRIES, INC., and DARREL KUIPER and DIANE KUIPER, D/B/A D. KUIPER DAIRY,

Petitioners,

v.

WILLIAM J. LYONS, JR., Secretary, Department of Food & Agriculture, State of California, and ROBERT TAD BELL, Undersecretary, Department of Food & Agriculture, State of California,

Respondents.

Writs Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR *AMICUS CURIAE* DAIRY INSTITUTE OF CALIFORNIA IN SUPPORT OF PETITIONERS ON THE MERITS

Thomas S. Knox, Esq.*
John M. Lemmon, Esq.
Glen C. Hansen, Esq.
Knox, Lemmon & Anapolsky, LLP
One Capitol Mall, Suite 700
Sacramento, California 95814
(916) 498-9911
Attorneys for *Amicus Curiae* Dairy Institute of California

*Counsel of Record

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BRIEF FOR *AMICUS CURIAE* DAIRY INSTITUTE OF CALIFORNIA IN SUPPORT OF PETITIONERS ON THE MERITS

STATEMENT OF INTERESTS

Dairy Institute of California is a California non-profit mutual benefit trade association representing dairy processing companies that purchase 52% of the milk produced in California. Dairy Institute members manufacture over 80% of the fluid, frozen and cultured dairy products and cheese sold in California. Many Dairy Institute members also have manufacturing facilities in other states.[1]

California processors have historically operated within California's regulated minimum pricing structure administered through the State's milk marketing program. California processors have been able to maintain their businesses and adhere to the State's regulated minimum prices for raw milk, so long as the minimum price structure does not increase raw milk prices to levels exceeding competitive conditions. One measure of competitive conditions is the price charged by out-of-state producers for raw milk.

California processors depend on milk purchases from sources outside California in order to meet their obligations to customers while still remaining competitive.

The July 1997 amendments to California's Pooling Plan upset the competitive balance. As a result of these amendments, out-of-state dairy farmers cannot receive the full value for their product when it is sold to California processors. These amendments create an economic disincentive for California processors to do business with out-of-state producers and lead to shutting down markets for those producers. The absence of reasonably priced supply fosters uncompetitive conditions within

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[1] No counsel for any party to this proceeding authored this brief in whole, or in part. No person or entity other than *Amicus Curiae* Dairy Institute of California, its members or counsel, made any monetary contribution to the preparation submission of this brief.

California, and the resulting uncompetitive conditions unduly increase milk prices to processors, wholesale customers and consumers.

SUMMARY OF ARGUMENT

The Ninth Circuit erred in this case because it mistakenly relied on *Shamrock Farms Co. v. Veneman*, 146 F.3d 1177 (9th Cir. 1998) (Reinhardt, J.) *cert denied*, 525 U.S. 1105 (1999). While *Shamrock* correctly concluded that 7 U.S.C. § 7254 (1999) shielded California's milk composition standards from scrutiny under the dormant aspect of the Commerce Clause of the U.S. Constitution, it erroneously extended that shield beyond the items enumerated in the statute – composition and labeling – and embraced all of California's milk pricing and pooling policies.

The Ninth Circuit erred in *Shamrock*, and consequently in this case, for at least three reasons.

First, in *Shamrock* and in this case, the Ninth Circuit ignored the plain language of the statute. The statute specifically identifies California's milk composition and labeling standards as areas protected from federal interference. The statute does not list California's milk pricing or pooling. Under the settled rules of construction, the language of the statute – what it states and what it omits - should be the clearest guide to congressional intent.

Second, the Ninth Circuit in this case relied on *Shamrock* for its conclusion that in spite of the statutory ellipsis, pooling and pricing policies must be included on the list of protected California activities because pricing and pooling policies are "closely related" to California's composition requirements and therefore also protected from Commerce Clause challenges. *Ponderosa Dairy v. Lyons*, 259 F.3d 1148, 1153 (9th Cir. 2001) (Pet. App. A7 – A8) (citing *Shamrock*, 146 F.3d at 1178, 1182). Both cases mistakenly relied on Congressional testimony taken out of context – perhaps inadvertently – to support the conclusion that composition standards were "closely related" to pooling and pricing policies. A fair and full reading of that testimony lends no support to that conclusion, however. Conversely, a review of California's milk laws shows the contrary. The State's milk composition and labeling standards are stand-alone bodies of law, independent of the pricing and pooling policies California has adopted.

Third, in *Shamrock* and in this case, the Ninth Circuit virtually abandoned this Court's standard for determining when Congress intends to exempt state regulation from dormant

Commerce Clause scrutiny. The standard for that determination, as this Court has held most recently, is whether Congress' intention in that regard is "unmistakably clear." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984). *See also Sporhase v. Nebraska ex. rel. Douglas*, 458 U.S. 941, 960 (1982); *C & A Carbone, Inc. v. Town of Clarkston*, 511 U.S. 383, 408 (1994) (O'Connor, J., concurring). Congress was "unmistakably clear" about its intention to protect California's milk composition and labeling standards from federal interference. Section 7254 expressly identifies those subject areas. However, Congress did *not* identify California's milk pricing and pooling policies as subject to the same protection. That should put paid to any obligation to inquire regarding what is "unmistakably clear" and what isn't.

For all of these reasons, the Court should reverse the court below and, further, disapprove *Shamrock* insofar as it holds that California's milk pooling and pricing policies are exempt from scrutiny under the dormant Commerce Clause.

ARGUMENT

I. The Court Below Misconstrued the Plain Language of 7 U.S.C. § 7254.

Section 7254 expressly lists two areas pertaining to fluid milk standards in California that are protected from direct or indirect preemption, prohibition or limitation under federal law: (1) setting the percentage of milk solids not fat in fluid milk products sold or marketed in California, and (2) labeling of fluid milk products with regard to milk solids or solids not fat.[2]

Section 7254 nowhere mentions California's pricing and pooling policies.

That should be the end of it. Had Congress wished to protect California's milk pooling and pricing policies from federal action, Congress would have said so directly. The customary guides to statutory construction reinforce that conclusion.

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[2] 7 U.S.C. § 7254, also referred to as Section 144 of the Federal Agriculture Improvement and Reform Act of 1996, states in its entirety: "Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding – (1) the percentage of milk solids or solids not fat in fluid milk products sold at retail or marketed in the State of California; or (2) the labeling of such fluid milk products with regard to milk solids or solids not fat."

A. Under the Doctrine of *Expressio Unius Est Exclusio Alterius*, Congress' Explicit Protection of Composition and Labeling Standards from Federal Intervention Supports the Conclusion that Congress Did Not Intend Implicitly to Extend Protection in Unenumerated Areas.

The venerable doctrine of statutory construction, *Expressio unius est exclusio alterius,* is applicable here. Congress having specified two areas in which California's milk standards are exempt from federal intervention, it is not for the court to spawn others by judicial fiat.

In *TRW Inc. v. Andrews*, 534 U.S. 19 (2001), a unanimous Court reversed the Ninth Circuit which had held that the statute of limitations for violation of the Fair Credit Reporting Act ("FCRA") begins to run at the time the plaintiff discovers he or she has been injured by a violation of the FCRA and not at the (earlier) time of the violation itself. *Id.* at 26. Although the statute on its face began to run at time of the violation, not the time that the plaintiff discovered his or her injury, *id.* at 22, the Ninth Circuit held that the requirement of discovery was implied in *every* federal statute of limitations. *Id.* at 26. Reversing the Ninth Circuit, the Court noted that Congress had adopted an explicit limitation based on discovery in FCRA actions involving misrepresentation, and so would not be presumed to have done the same thing *implicitly* in all other FCRA actions. *Id.* at 28. The Court stated, "The most natural reading of § 1681p [the limitation based on discovery in FCRA misrepresentation actions] is that Congress implicitly excluded a general discovery rule by explicitly including a more limited one." *Ibid. See also United States v. Johnson,* 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference, and the one we adopt here, is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth."); *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent.")

Section 7254 satisfies even the Court's restrictive reading of the *Expressio unius* rule in *Barnhart v. Peabody Coal Co.*, 523 U.S. ___, 123 S. Ct. 748, 71 USLW 4041 (January 15, 2003). In *Barnhart*, the Court cautioned that it applied the principle only

when "[t]he items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Id.* at ___, 123 S.Ct. at 760 (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)). *See also Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 81 (2002).

It is beyond dispute that the milk composition standards described in § 7254(1) and the milk labeling standards described in § 7254(2) are an "associated group or series." Congress' election to afford explicit protection from federal interference in these two areas of California milk law, without also listing California pricing and pooling policies, justifies the conclusion that Congress intended no such protection for the latter.

B. The Ninth Circuit's Ruling that Virtually All of California's Milk Laws are Protected from Federal Intervention Because They are "Closely Related" to the §7254(1) Composition Standards Would Render § 7254(2) Superfluous.

The Ninth Circuit holds that California's milk pricing and pooling policies are protected from federal intervention under § 7254 because they are "closely related" to the milk composition standards of § 7254(1). *Ponderosa*, 259 F.3d at 1153 (Pet. App. A7-A8) (citing *Shamrock*, 146 F.3d at 1182). How much more closely related to the composition standards are the labeling standards of § 7254(2)? Subsection (1) refers to standards governing "the percentage of milk solids or solids not fat in fluid milk...." Subsection (2) refers to the "the labeling of such fluid milk products with regard to milk solids or solids not fat." Under the Ninth Circuit's reasoning, subsection (2) protecting labeling is superfluous because labeling is "closely related" to the composition standards of subsection (1) and therefore protected already from federal interference.

It is a canon of construction, however, that the courts will whenever possible avoid construction of statutes that render any section mere surplusage. *See TRW*, 534 U.S. at 29. In *TRW*, dealing with the statute of limitations under the Fair Credit and Reporting Act, the Court cited the canon as an additional reason for rejecting the Ninth Circuit's decision that implied a discovery element in every FCRA statute of limitations. The Ninth Circuit's gloss, the Court said, would make surplusage of the single statute that contained an explicit discovery element in actions based on intentional misrepresentation. *Ibid.* The Court held, "It is 'a

cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant.'" *Id.* at 31 (quoting *Duncan v. Walker,* 533 U.S. 167, 174 (2001)). *See also United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

The plain language of the statute, along with the conventional canons of construction, compel the conclusion that Congress did not intend to exempt California's pooling and pricing policies from dormant Commerce Clause scrutiny.

II. California's Milk Composition and Labeling Standards Are Not "Closely Related" to the State's Pricing and Pooling Policies.

Were the plain language of the statute all that this Court considered, its decision to overturn the Ninth Circuit in this case would already be an easy one. That decision is easier still, however, in light of the lower court's misplaced reliance on the congressional testimony described in *Shamrock*. Further, an examination of the outline and structure of California's milk laws shows that the State's milk composition and labeling standards are independent of the pricing and pooling policies and not "closely related" at all.

A. The Congressional Testimony Cited in *Shamrock* and in this Case below Does Not Support the Conclusion that the Milk Standards Identified in Section 7254 are "Closely Related" to the State's Milk Pooling and Pricing Policies.

The *Shamrock* court cited statements made by a Member of Congress from California and the Executive Director of this *Amicus Curiae* Dairy Institute of California as legislative history demonstrating that Congress intended that the milk pricing and pooling be exempted from Commerce Clause scrutiny. 146 F.3d at 1182. *Shamrock's* description of those statements is misleading.

The Ninth Circuit summarized the testimony of the Honorable Bill Thomas as "explaining that the success of California's milk standards is attributable to the State's pricing system." *Shamrock*, 146 F.3d at 1182 (citing *Hearing Before the Subcomm. On Livestock, Dairy and Poultry*, 104th Cong., Apr. 20,

1995 ("*House Hearing*"), at 435-436).[3] That is not what he said. The theme of Rep. Thomas' statement was the success of "the California dairy industry." *House Hearing* at 435. After attributing "[a] substantial part of that success" to the "enormous growth in California's population," Rep. Thomas described "two other factors for the California dairy industry's success." *Ibid.* First, he explained that "the State of California has for over 30 years had a set of standards for fluid milk products which ensure a high quality product." *Ibid.* Then, Rep. Thomas stated, "The California dairy industry has enjoyed great success for another reason: the pricing system for dairy products in California has been developed through a very flexible, market-oriented approach." *Ibid.* Thus, Rep. Thomas actually attributed the success of California's dairy industry to the State's "pricing system"; he did not attribute the success of California's "milk standards" to the "pricing system," as the Ninth Circuit asserts. *Shamrock,* 146 F.3d at 1182.

Also misleading is the Ninth Circuit's summary of the written testimony of Craig S. Alexander, Executive Director at the time of Dairy Institute of California. The *Shamrock* court stated that Mr. Alexander "discuss[ed] California's pricing and pooling system in the context of California's milk quality standards." 146 F.3d at 1182. That is not an accurate summary of Mr. Alexander's testimony. Mr. Alexander made remarks regarding "those issues which specifically impact California's programs" that Congress should consider as it pieces together a new national farm bill. *House Hearing*, at 480. Those "issues" briefly mentioned by Mr. Alexander were "California's milk marketing programs," "California market order pricing policies," "Federal Producer Security Legislation," and finally, "Milk Solids Standards." *Id.* at 481-82. Contrary to the Ninth Circuit's summary of Mr. Alexander's remarks, the final discussion regarding California's milk composition standards did not form the "context" of Mr. Alexander's remarks, and did not even relate to his earlier remarks regarding milk pricing. *Ibid.*

Thus, the Ninth Circuit fails to cite any reliable legislative history in *Shamrock* demonstrating that Congress intended that the milk pricing and pooling scheme be included in the § 7254 exemption as a means of effecting California's milk composition standards.

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[3] Applicable pages of the *House Hearing* are attached hereto as A1 through A7.

B. California's Milk Marketing Laws Show that the State's Milk Pooling and Pricing Policies are Independent of the Milk Standards Identified in § 7254.

In *Shamrock*, the Ninth Circuit asserted that California's pricing and pooling laws are an element of the "milk fortification scheme" and are "an essential part of California's plan to maintain its milk composition standards." 146 F.3d at 1182. In the case at bar, the court below added that the pricing and pooling schemes are "closely related" to composition standards. *Ponderosa*, 259 F.3d at 1153 (Pet. App. A7-A8). Each of those assertions is incorrect. Illogically, the Ninth Circuit has lumped together three different legislative schemes, found in three distinct provisions of the California Food & Agricultural Code and administered by three different divisions of the California Department of Food and Agriculture.

California's law regarding milk composition standards (or "standards of identity") is set forth in Milk and Milk Products Act of 1947, which is codified in Division 15 of the State's Food & Agricultural Code. *See* CAL. FOOD & AGRIC. CODE § 32501, *et seq*. (West 2001). Not surprisingly, California's milk labeling laws relating to those milk compositional standards are also found in Division 15 of the State's Food and Agricultural Code. *See* CAL. FOOD & AGRIC. CODE § 32912 (West 2001). *See generally, People ex rel. Lockyer v. Shamrock Foods Co.*, 24 Cal.4th 415, 418-19, 11 P.3d 956, 959, 101 Cal.Rptr.2d 200, 203 (2000). The Milk and Dairy Foods Control Branch of the California Department of Food and Agriculture enforces the state's composition standards and labeling requirements.

California's law regarding milk pricing, however, is found in Chapter 2 ("Stabilization and Marketing of Market Milk") of Part 3 ("Marketing Laws Regarding Particular Products") of Division 21 ("Marketing") of the State's Food and Agricultural Code. *See* CAL. FOOD & AGRIC. CODE § 61801, *et seq*. (West 1997). The legislative purposes of Chapter 2 are (1) to provide funds for administration and enforcement of the milk pricing laws; (2) to authorize the Director of the Department of Food and Agriculture to prescribe marketing area and to determine minimum prices; (3) to authorize and enable the Director of the Department of Food and Agriculture to formulate stabilization and marketing plans; and (4) to enable the dairy industry to develop and maintain satisfactory marketing conditions, bring about and maintain a reasonable amount of stability and prosperity in the

production of market milk, and provide means for carrying on essential educational activities. *See* CAL. FOOD & AGRIC. CODE § 61805 (West 1997). Those stated purposes underlying the California's pricing laws say nothing about maintaining the State's milk composition standards and labeling requirements. The milk pricing laws are administered by the Dairy Marketing Branch of the California Department of Food and Agriculture through the Stabilization Plan. The Dairy Marketing Branch is different from the branch that administers the composition and labeling laws.

California's Gonsalves Milk Pooling Act of 1967 is found in Chapter 3 ("Equalization Pools") of Part 3 ("Marketing Laws Regarding Particular Products") of Division 21 ("Marketing") of the State's Food and Agricultural Code. *See* CAL. FOOD & AGRIC. CODE § 62700, *et seq*. (West 1997). In enacting the milk pooling laws, the California Legislature not only articulated the purposes behind those laws, but also distinguished them from the pricing and stabilization laws (*i.e.,* Chapter 2 of Part 3 of Division 21 of the Food & Agricultural Code). The Legislature generally explained:

> It is recognized by the Legislature that currently the powers conferred upon the director by Chapter 2 (commencing with Section 61801) are inadequate to enable the dairy industry to develop and maintain satisfactory marketing conditions and bring about and maintain a reasonable amount of stability and prosperity in the production of fluid milk and fluid cream; and that to accomplish these purposes, and particularly to insure [sic] to consumers within California an adequate and continuous supply of pure, fresh, and wholesome milk at fair and reasonable prices, including a reasonable estimate of the additional supply which is needed to provide for normal fluctuations in production and in consumer demand for those products, those powers must be supplemented by the powers conferred in this chapter upon the director to equalize gradually the distribution of class 1 usage among the producers of this state.

CAL. FOOD & AGRIC. CODE § 62702 (West 1997).

The Legislature described the specific purposes of the pooling laws as the "equalization of usages among producers" and the "entry of new producers. " *See* CAL. FOOD & AGRIC. CODE §

62702.1. (West 1997). Those general and specific legislative purposes underlying the pooling laws are silent regarding maintenance of the State's milk composition standards and labeling requirements. The milk pooling laws are administered by the Milk Pooling Branch of the California Department of Food and Agriculture, which is different from the branches that administer the composition and labeling laws, or for that matter, the pricing laws.

III. The Ninth Circuit Has Ignored This Court's "Unmistakably Clear" Standard for Determining When Congress Intends to Confer an Exemption from Dormant Commerce Clause Scrutiny.

Section 7254 does not make "unmistakably clear" that Congress intended to exempt California's milk pricing and pooling policies from dormant Commerce Clause scrutiny. Rather, the contrary conclusion is more reasonable in light of the statute's silence on the matter, interpreted in light of the canon of *Expressio unius* and the principle that the court will avoid where possible rendering any part of a statute mere surplusage.

The Court has always maintained a very high bar to claims that Congress intended an exemption to dormant Commerce Clause scrutiny. In *South-Central Timber Development,* the Court held that such intent must be "unmistakably clear." 467 U.S. at 91. In that case, a timber company challenged on Commerce Clause grounds an Alaska state requirement that timber harvested on state land be processed in the state before export. Alaska responded that Congress had intended to exempt such "primary-manufacture" requirements from Commerce Clause scrutiny. In support of that claim, Alaska pointed to a federal policy restricting out-of-state shipment of unprocessed timber from *federal* lands. *Id.* at 89-90. The Court held that evidence of the federal policy was insufficient by itself to establish Congressional intent to exempt even a parallel state policy from Commerce Clause scrutiny. *See id.* at 92-93.

The Court explained the purpose of maintaining a high threshold for ascertaining Congressional intent with regard to such exemptions. The Commerce Clause is designed "'to avoid the tendencies toward economic Balkanization that had plagued relations among the colonies and later among the States under the Articles of Confederation.'" *Id.* at 92 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979)). Legislative or regulatory action by a state affecting interests within the state will normally

be constrained by the state's political processes. Such constraints may not operate, however, where the burden of the state's legislative or regulatory action falls on interests situated outside the state and therefore unrepresented in the state's political processes. *Ibid.* For such "outside interests," the Commerce Clause provides protection from discriminatory action by the state.

Although Congress may from time to time exempt specified state actions from Commerce Clause scrutiny, congressional review at least assures that all segments of the country have been represented in the decision-making process, thereby reducing the danger that one state will be in position to exploit others. The rule requiring "unmistakably clear" intent by Congress in connection with such exemptions serves this purpose.

> A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce.

Id. at 92. The application of the "unmistakably clear" standard to this case yields a result that is itself unmistakably clear. In enacting § 7254, Congress evidenced no intent to exempt from dormant Commerce Clause scrutiny any portion of California's milk laws other than those specifically enumerated: composition standards and labeling standards. The language of the statute omits any mention of other subject matter. The rule of construction *Expressio unius* and the judicial policy of avoiding interpretations that will render any portion of a statute surplusage support that conclusion. The congressional testimony cited in the court below does not establish that composition and labeling standards are so "closely related" to the unenumerated items that congressional intent to confer an exemption on areas other than those specifically listed in the statute must be presumed. To the contrary, an examination of California's milk laws shows that the composition and labeling standards are *not* especially entwined with the State's pricing and pooling policies, and certainly not linked to the extent that congressional intent to extend the exemption may be inferred.

In other cases, the Court has described the test for congressional intent in similar but no less demanding ways. In *Sporhase,* 458 U.S. 941, the Court rejected a claim by the State of Nebraska that Congress had intended to exempt ground water regulation from Commerce Clause scrutiny. The Court noted that

in other cases sustaining such exemptions, Congress had "expressly stated" its intention to do so. *Id.* at 960 (citing *New England Power Co. v. New Hampshire,* 455 U.S. 331, 343 (1982) (quoting *Prudential Ins. Co. v. Benjamin,* 328 U.S. 408, 427 (1946))). In the case at bar, of course, Congress has nowhere "expressly stated" its intention to exempt California's pricing and pooling standards from scrutiny. Had Congress wished to do so, it would certainly have added them to the short list of subject areas in § 7254.

It makes little difference in this case whether the test for Congressional intent is described as a requirement that the exemption be "expressly stated" or "unmistakably clear." Application of either standard shows that Congress did not intend to exempt California's pricing and pooling standards from dormant Commerce Clause scrutiny.

CONCLUSION

Section 7254 refers expressly to California's composition and labeling standards. It omits any reference to the broader areas of pricing and pooling. In itself, that should be sufficient evidence of Congress' intent to exempt only the former standards from dormant Commerce Clause scrutiny.

The Ninth Circuit notwithstanding, California's composition and labeling standards are not so "closely related" to the State's pricing and pooling policies as to warrant the inference that Congress intended something more than what it stated plainly in the statute. The congressional testimony summarized in *Shamrock*, read in its entirety, does not support the conclusions drawn by the *Shamrock* court regarding the interdependence of composition standards on the one hand and pooling and pricing policies on the other. Rather, an examination of California's milk laws shows that they intersect hardly at all.

The Ninth Circuit's rulings in this case and in *Shamrock* pays lip service only to the Court's standard for ascertaining congressional intent in connection with claims of exemption from Commerce Clause scrutiny. The Court has articulated that standard as evidence that is "unmistakably clear" or even "expressly stated." The Ninth Circuit's holding in this case fails either test.

For the reasons set forth herein, this Court should reverse the Ninth Circuit in this case and disapprove *Shamrock* to the

extent it holds that California's milk pooling and pricing policies are exempt from dormant Commerce Clause scrutiny.

Respectfully submitted,

THOMAS S. KNOX
JOHN M. LEMMON
GLEN C. HANSEN
Attorneys

FEBRUARY 21, 2003

APPENDIX

FORMULATION OF THE 1995 FARM BILL (DAIRY TITLE)

HEARINGS

BEFORE THE

SUBCOMMITTEE ON DAIRY, LIVESTOCK, AND POULTRY

OF THE

COMMITTEE ON AGRICULTURE HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

WASHINGTON, DC, MARCH 23, 1995
EAU CLAIRE, WI, APRIL 18, 1995
ST PAUL, MN, APRIL 19, 1995
TULARE, CA, APRIL 20, 1995
SYRACUSE, NY, APRIL 24, 1995
OKEECHOBEE, FL, APRIL 28, 1995

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Statement For the Record
THE HON. BILL THOMAS
Subcommittee on Livestock, Dairy and Poultry
April 20, 1995

I appreciate the Chairman's willingness to hold a hearing in Tulare County on dairy issues. In the past, dairymen across the nation have had public, divisive disputes about farm legislation and dairy policy. With the spending constraints under which Congress and the Department of Agriculture are going to operate in the next few years, this hearing is an indication of the Chairman's willingness to work with all segments of the dairy community as this Subcommittee begins deliberations on the 1995 Farm Bill.

As most of you know, the California dairy industry has been very successful in recent years. A substantial part of that success is due to enormous growth in California's population. There are two other factors for the California dairy industry's success that I hope the Subcommittee will allow the State to preserve.

First, the State of California has for over 30 years had a set of standards for fluid milk products which ensure a high quality product. These standards require addition of nonfat solids into low fat milk, making low fat milk taste like whole milk. Milk consumers also get more calcium and protein under these standards. The standards are strongly supported by consumers in California, by dairymen and by nutritionists interested in the health of children and women.

Unfortunately, national nutritional labeling requirements may lead to the termination of California's system. These standards have come under assault recently by dairymen outside the state, who wish to ship lower standard, so-called "federal milk" into California. California's fluid milk standards are one area where a state really "knows best." The California fluid milk market is almost totally self-contained--only 1% of the state's total consumption comes from out-of-state sources. The standards are not a barrier to milk produced in other states as, until recently, all packaged milk entering the state conformed to California standards. In a case such as this, where a state has had a very successful program for several decades, and where any burden on outside interests is largely theoretical, I would hope the federal government would not override that system.

In addition to all the nutrition and health reasons why California fluid milk standards should remain in place, there will be a very real impact on the federal deficit if the California standards are overridden. Without the standards, California dairymen will offer additional product to the Commodity Credit Corporation, which in turn increases the federal deficit. The Congressional Budget Office has estimated this impact in the vicinity of $75 million over the next five years.

Unless the law is amended soon, California's standards may be eliminated. To give the State the ability to preserve a system that has served Californians well, I have introduced H.R. 999. This bill would exempt California's standards from the federal requirement. Although the bill is not before the House Agriculture Committee, I hope you would join me in supporting it.

The California dairy industry has enjoyed great success for another reason: the pricing system for dairy products in California has been developed through a very flexible, market-oriented approach. Products are priced according to what the market dictates. California dairymen believe very strongly that this system must be retained. In fact, the Subcommittee may want to examine the California system, to see whether there are aspects of it which could serve as the basis for changes in the federal order system.

BEST AVAILABLE COPY

I also want to say a word about California's "make allowance" for manufactured dairy products. When Congress sought to override the California "make allowance" in section 102 of the 1990 Farm Bill, it involved USDA and dairymen in a morass. USDA recently suggested that section 102 should be rethought during development of the 1995 farm bill. In reconsidering the policy, I hope the Subcommittee will decide to allow California to retain its historic practice.

The advantages of allowing California to preserve its make allowance are clear. The Congressional Budget Office estimates that ending California's make allowance would increase spending under today's farm bill by as much as $54 million during the next five years. Such a cost increase is hard to defend when congress is being forced to scrutinize every federal account for potential savings.

At a time when farm groups are going to need each other's support to pass a farm bill, I hope the Subcommittee will consider all the possibilities and advantages of California's dairy system. I have heard many of the new members of the House call for serious restructuring of all farm programs. If that is what our colleagues will demand of us, California's milk market system may very well help us develop the kind of reforms our colleagues will demand in return for passing a 1995 farm bill.

Mr. TILLISON. See, Mr. Peterson, somehow California can lower the milk price all over the United States, but you will not believe that a producer in California that is not willing to go along with the pricing structure because he is looking for a market himself, can have the same impact in California on our milk prices. It does happen.

Mr. PETERSON. A producer or a processor?

Mr. TILLISON. A producer.

Mr. PRINCE. An individual.

Mr. TILLISON. A producer organization.

Mr. PETERSON. But if they are all in the cooperatives, I——

Mr. TILLISON. They are not all in the cooperatives, that is the problem.

Mr. PETERSON. I appreciate the chance to ask that question, Mr. Chairman.

Mr. GUNDERSON. Thank you, and thank you all for your contributions.

We will call our next panel. Craig Alexander of the Dairy Institute of California; Larry Jensen, Leprino Foods; Richard Low of Darigold Foods; and John Kaczor of Super Stores Industries.

I apologize. Mr. Ziehnert is going to replace Mr. Richard Low.

I understand everyone's need to stretch and all of that. I would encourage you, if you want to visit for a little bit, that you step outside. As you can see, the hearing is taking perhaps more time than some anticipated because of the dialogue. I think that is healthy personally, but as a result, I am going to beg everyone's cooperation so that we can continue to move along.

With that, Craig, if you are ready, you are recognized for 5 minutes.

STATEMENT OF CRAIG ALEXANDER, DAIRY INSTITUTE OF CALIFORNIA

Mr. ALEXANDER. Thank you, Mr. Chairman and members of the Committee. I appreciate the opportunity to testify today regarding the upcoming 1995 farm bill. My name is Craig S. Alexander. I am the executive director of the Dairy Institute of California. Dairy Institute is a voluntary trade association representing 45 dairy companies who process fluid, cultured and butter, powder and cheese products in the State of California.

Dairy Institute has traditionally represented California's processors on State dairy issues. Many of our members are also members of the International Dairy Foods Association which has well represented California's dairy processors interests on most federal issues. In the last 5 years, it seems that several Federal policies have targeted the unique and often times progressive dairy marketing policies found in California. In response, Dairy Institute has become active on those issues which specifically impact California's programs. We wish to focus our attention today primarily on those issues.

Let me first say, however, that the 1995 farm bill debate may provide a great opportunity for the dairy industry, rather than a threat, as we prepare for the 21st century. The dynamic nature of dairy farming is evident here in California. Dairy product technologies and consumer markets are also rapidly changing, particu-

larly with the NAFTA and GATT agreements. Federal dairy policy needs to focus first and foremost on expanding dairy markets at home and abroad. Without shifting the priority to market expansion and competitive pricing policies we will lose domestic and international opportunities and in the long run farm prices and incomes will suffer.

California's milk marketing programs. The California system of regulation has adapted to the rapidly changing dairy industry and unique programs have developed in advance of slower development of Federal policies. The responsiveness of the program has been beneficial to dairy farmers and processors. One aspect of the State's milk order program, for example, is that decisions can be made and in fact are required to be made in the matter of a few months rather than a few years as is currently the case under Federal marketing orders. Dairy Institute supports this type of responsiveness and would recommend that Federal milk order regulations each make similar procedural changes to be effective in the future.

California market order pricing policies. There's been a perception that California's market order regulation has somehow created California's growth in milk production. The cause of California's growth in dairying has been due to the outstanding productivity and management capability of California's dairymen. California's market order regulation with respect to manufacturing prices is simple. It develops manufacturing milk prices based on the market values for butter, powder and cheese as well as the product yields and processing costs of the manufacturers.

Dairy Institute strongly supports the repeal of Section 102 of the 1990 farm bill. Implementation of Section 102 would not only injury processors in California, including the farmers that own processing facilities, but studies have also shown that Section 102 as proposed by USDA, will increase nonfat dry milk production, increase CCC sales and reduce farm income in other parts of the country. Price setting for manufacturing milk under Federal orders should adopt competitively lower minimum prices similar to California's. Setting manufacturing prices nationally based on the obsolete M–W is a prescription for increased milk supplies outside the upper midwest, reduced international competitiveness, and reduced dairy product demand.

Federal Producer Security Legislation. California producers and processors developed a producer security program after the default of a major processor in the State in 1986. This innovative program was carefully designed to serve the needs of the industry. Dairy Institute is very concerned that attempts to preempt a well defined successful program will result in higher costs for processors and reduced protection for dairy farmers. If it is felt that a Federal program is needed for other areas of the country that do not have security laws, California's system would be exempted.

Federal Milk Solids Standards. Dairy Institute has supported California's higher solids standards for fluid milk products. It is a system which has worked in California, but we do not know if the program adapts very well to other parts of the country as some producer groups have discussed. It was of concern to our members that federal preemption of the California standards took place under the Nutrition Labeling and Education Act of 1990 without

consideration for the longstanding tradition of our program. We supported a petition to FDA and Federal legislation last fall to preserve California's standards. At this point, California standards are being challenged by an out-of-state company and some of California's fluid processors have lost business to out-of-state competitors with lower cost Federal solids milk products. If the issue is to be resolved legislatively, it must be resolved quickly, and we feel the issue should not wait several months for the farm bill.

This concludes my testimony and I would be happy to answer any question.

Mr. GUNDERSON. Thanks.

Larry Jensen.

[The prepared statement of Mr. Alexander appears at the conclusion of the hearing.]

STATEMENT OF LARRY JENSEN, LEPRINO FOODS

Mr. JENSEN. Thank you, Mr. Chairman.

Mr. Chairman, and Subcommittee Members, I appreciate the opportunity to summarize the views of Leprino Foods Company contained in the accompanying statement on important issues facing our dairy industry. The 1995 farm bill presents us with the opportunity and challenge to review national dairy policy for the first time in the context of the Uruguay Round of the GATT.

Recent trade initiatives such as NAFTA and the Uruguay Round provide unprecedented opportunities for future development of international markets for American dairy products. In formulating national dairy policy, U.S. policy makers must ensure that government programs enhance, rather than impede our industry's ability to capitalize on these opportunities. Over the course of the next 10 to 15 years it is likely that international trade in dairy products will expand significantly. It is critical that the U.S. dairy industry position itself over the long term to capture a much greater share of the world market and remain competitive in its domestic markets by encouraging and capitalizing on efficiencies in our own milk production and processing systems. The U.S. dairy industry will be positioned for global opportunities only if free market competition is allowed to flourish within our domestic industry.

Current Federal manufacturing milk price policy centered around the obsolete Minnesota/Wisconsin price series is stifling the transition toward global competitiveness. When established 35 years ago, the M–W reflected the market clearing value of milk in the primary reserve supply region of the Nation; however, it now reflects a localized highly competitive deficit market that incorporates a premium above the fundamental value of milk. Mr. Chairman, much of the concept of basing fluid milk differentials on distances from this former reserve supply region has become obsolete. So has the concept of basing minimum manufacturing milk prices on competitive prices in that region. In spite of USDA's attempts to temporarily correct its shortcomings, the M–W is no longer reflective of a market clearing value for manufacturing milk.

The use of a manufacturing milk price in the Federal orders that is well above market clearing value in many parts of the company has led to rapid milk production growth in lower cost regions such as the West and Southwest. This growth has contributed to an in-

Supreme Court, U.S.
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Nos. 01-950 and 01-1018

IN THE SUPREME COURT OF THE UNITED STATES

HILLSIDE DAIRY INC., ET AL., PETITIONERS,
v.
WILLIAM J. LYONS, JR., SECRETARY, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, ET AL., RESPONDENTS

PONDEROSA DAIRY, ET AL., PETITIONERS
v.
WILLIAM J. LYONS, JR., SECRETARY, CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR CONTINENTAL DAIRY PRODUCTS, INC. AND SELECT MILK PRODUCERS, INC AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

BENJAMIN F. YALE
Counsel of Record

KRISTINE H. REED
RYAN K. MILTNER
BENJAMIN F. YALE & ASSOC. CO., L.P.A.
102 W. Wapakoneta Street
PO Box 100
Waynesfield, OH 45896
419-568-5751
ATTORNEYS FOR AMICI

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INTERESTS OF *AMICI CURIAE*

Select Milk Producers, Inc. ("Select") and Continental Dairy Products, Inc., ("Continental") file this brief in support of the arguments advanced by Petitioners Hillside Dairy, Inc., A&A Dairy, L&S Dairy, Milky Way Farms, Ponderosa Dairy, Parhump Dairy, Rockview Dairies, Inc., and Darrel and Diane Kuiper, dba D.Kuiper Dairy. [1] Consent to the filing of this brief has been granted by the Hillside Dairy, Inc., et al., petitioners and the Ponderosa Dairy, et al., petitioners as well as by the respondents herein. Written consent of all of the parties accompanies this filing.

Select and Continental have an interest in maintaining stable and competitive marketing conditions for fluid milk and milk products irrespective of state borders. The California milk pricing regulations that are at the core of this case are by design and intent established to protect the California dairy industry from out-of-state competition for milk supplies while making out-of-state sales of their dairy products more competitive. This state mercantile dairy policy significantly interferes with the trading of milk and milk products between the states.

Select is a New Mexico milk marketing cooperative with members in New Mexico, Texas, and Kansas. Continental is an Ohio milk marketing cooperative with members in Indiana, Michigan and Ohio. They market

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1 This brief was authored in whole by the attorneys for *amici curaie* Select Milk Producers, Inc. and Continental Dairy Products, Inc. and no person or entity, other than the *amici curiae*, made a monetary contribution to the preparation or submission of this brief.

their members' milk to regions throughout the country with the exception of the Northwest and the Northeast. The free movement of milk throughout the entire nation is necessary because the areas with efficient milk production are not necessarily where the market for milk and milk products lies. For example, New Mexico is now the seventh largest producer of milk among the States, but is thirty-sixth in population. It is a large exporter of milk into the remaining states. The availability of a national market for that milk is essential to producers in such exporting states. As production continues to grow so does the reliance on markets in other states and regions.

These cooperatives market milk of their members to bottlers and manufacturers nationwide, including those in California and in areas under the Federal Milk Marketing Orders ("FMMO"), 7 C.F.R. Parts 1000 - 1135, administered by the United States Department of Agriculture ("USDA") in accordance with the Agricultural Marketing Agreement Act of 1937, 7 U.S.C.A. §608c ("AMAA"). The AMAA stabilizes the marketplace by creating orderly marketing conditions.

This goal is met through the use of a two-tiered pricing system wherein plants pay minimum prices for milk based upon their use of the milk (to make butter, cheese, creams, bottled milk, etc.) but producers receive a uniform price irrespective of the end use of their milk. The law prohibits the Secretary from promulgating marketing regulations that create trade barriers. As a result, the cooperatives can move their members' milk into these orders and know that they compete equally with the other producers regardless of the source of this milk. *Zuber v. Allen*, 396 U.S. 168 (1969). If Select and Continental elect to deliver milk to a distant plant, there are no economic or price

regulations that make their milk at that plant less valuable than milk from other producers.

Not all milk is subject to the minimum pricing under the FMMOs. Manufacturing plants have the option to participate or not. Some do not. Additionally there are plants located in regions not subject to the minimum federal prices. In those instances, Select and Continental compete with other producers on the basis of the market dynamics in that region.

California is an exception to all of this. As the largest milk producing state as well as the most populated, its industry operates under its own set of economic rules that protect its producers from out-of-state competition for milk supplies and subsidize its manufacturers to more favorably compete for product sales in the national marketplace.

Foreign state milk producers receive different treatment in the pricing than producers located within California. Some California producers receive an enhanced "quota price" on some of their milk and the remaining milk is paid on the basis of an "overbase" price. The enhanced price on quota milk (19.5 cents per pound of solids-not-fat) comes out of the pool due producers. CDFA Pooling Plan for Market Milk, as amended, effective September 1, 2001, § 906 (hereinafter, "Pooling Plan"). There is no correlation between the actual use of the milk and its right to this quota. None of Select's members own quota even though Select from time to time has marketed their milk into the state. Only milk produced in California can acquire this quota.

Through its universal minimum pricing and pooling plan, the California system imposes minimum prices on plants for milk based upon one of five classes

of milk usage. Plants account to a settlement pool by paying for milk purchases offset by the quota and overbase due the supplying producer. The result is that a Class 1 plant pays more for the milk than the producers supplying it receive and a Class 4 plant generally pays less than what its suppliers ultimately receive.

Producers receive a uniform price regardless of use. The minimum class prices do not attract milk to the plant. In this way, California provides what it believes is an appropriate producer price by combining higher prices for Class 1 which offset lower minimum prices for milk used in its cheese and non-fat dry milk (NFDM) plants. Generally the prices for milk used for manufacturing are lower than those in the rest of the nation.

Because they are not entitled to the uniform minimum prices, Select and Continental have to compete for sales at the minimum prices. As a result, Select rarely, if ever, moves milk into the California Class 4a or 4b markets (milk used in NFDM or cheese). This is because California, using in part the money from the Class 1 buyers, is able to reduce the minimum prices plants in California pay for milk used in making cheese or non-fat dry milk while, at the same time, continue to pay producers in California a reasonable minimum price.

On the other hand, the higher priced Class 1 markets can be attractive. As explained, California needs the extra money from the Class 1 and 2 sales to both have lower manufacturing prices to promote its domestic plants and pay its producers an adequate quota and overbase price. Milk purchased from out-of-state producers for Class 1 reduces the amount of money in the pool that supports the lower minimum

prices for the manufacturing plants. To reduce the erosion of the Class 1 sales to out-of-state producers, the California Department of Food and Agriculture ("CDFA") changed the rules so as to make importing milk less attractive. That is the genesis of this case.

Currently, any California bottling plant which receives out-of-state milk is effectively required to pay into the California pool the full Class 1 price and only receives a credit equal to the quota price for that month. This compulsory payment provides additional funds to the California pool to subsidize its manufacturing plants and, at the same time, reduces the money a plant can offer for out-of-state milk. In order to competitively market milk to a California bottling plant, an out-of-state seller has to reduce the selling price a penny for every penny charged by CDFA to the plant. Neither the out-of-state producer nor its cooperative will benefit in any way from the payment into the pool.

Not only do the California regulations discourage exporting milk into that state, but also change the competitive balance outside of the state. Milk from nearby states discouraged from moving into California, primarily Nevada and Arizona, will seek markets East and will, necessarily, more directly compete with Select and Continental in their markets. In this way, California's interpretation of its consumer labeling laws exerts influence over the pricing and movement of raw milk used not only for bottled milk but for cheese, butter, and cream. The regulations affect the flow of raw milk not only into and out of California, but throughout the rest of the Nation.

The lower California minimum prices for milk used to make cheese and NFDM further alter the marketplace outside of that state. By design and intent

of the California program, the California plants are given an economic advantage through lower milk costs. These plants can, and do, sell their products for less than the rest of the nation. They then report these lower prices to the National Agricultural Statistics Service ("NASS"). These NASS surveys are used by the USDA to establish the minimum prices for milk in the federal orders. 7 C.F.R. § 1000.50. In this way, the lower prices in California translate into lower prices for the federal markets. If it was unable to impose Class 1 fees on imported milk, this result would not occur.

Finally, the mercantile policies in California, particularly its goal of keeping its domestic manufacturing plants competitive, challenges new manufacturing plants outside of California. Select has from time to time considered the acquisition of, or partnership with, manufacturing capacity in its marketing area. All business models have to factor in the potential of California continuing to tailor its pool program to keep its plants more competitive.

In summary, the California pooling program does affect the flow of milk and milk products into and out of California. Its quota program is designed to promote production growth in its state, its lower manufacturing milk prices discourage its domestic plants from buying milk from out-of-state, its compensatory payment provision on imported milk used in Class 1 subsidizes the California producers and reduces market opportunities for out-of-state milk, its barriers to importing milk forces nearby milk east into those markets, its subsidized domestic manufacturing plants influence national, and thus federal, milk prices, and the development of new manufacturing capacity elsewhere.

None of this minimum pricing, pooling, compensatory payments, quota or the like has anything to do with the minimum composition standards of bottled milk sold at retail. Producers deliver raw milk that contains the components in the ratios the cows produce. The plants take some of those components out (generally reducing the butter fat from over three percent to some lesser amount) and adding protein through fortification. Quota, overbase, minimum prices, compensatory payments and the like have nothing to do with that.

Neither Select nor Continental nor their members are citizens of California and cannot participate within that political arena. The various elements within the California dairy industry and the regulatory body have a clear interests in preserving this system. The only opportunity that Select, Continental, or the petitioners, have to open up competition to a fair and equal basis is by a Constitutional challenge such as this one.

As the foregoing show, Select and Continental are most interested in the outcome of this case. The result of this case will not be felt merely by a few producers in Arizona and Nevada or the California dairy industry, but by all producers throughout the Nation. If unchecked, California can protect its producers from competition with outside sources of milk and use its internal pooling to underprice cheese and NFDM manufacturers.

SUMMARY OF ARGUMENT

California's milk pricing and pooling regulations constitute an unreasonable burden on interstate commerce in violation of the Commerce Clause. U.S. Const. art. I, § 8, Cl. 3. Congress did not clearly and explicitly remove California's milk pooling and pricing scheme from the purview of the Commerce Clause. Under the most fundamental maxims of statutory construction, there can be no conclusion that the result achieved by the California Department of Food and Agriculture was the result intended by Congress. Congress has not exempted the California program from the restrictions of the Commerce Clause. *Maine v. Taylor*, 477 U.S. 131, 137-38 (1986). Because of the constitutional ramifications of such a grant of authority, these grants must be made explicitly and "unmistakably clear." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 91-92 (1984). Furthermore, in interpreting an alleged exemption from the application of the Commerce Clause, the statutory language should demonstrate that the Congress has "affirmatively contemplate[d]" the otherwise unconstitutional state regulations. *Id.*

The effect of California's milk regulations on interstate commerce is significant. By assessing milk handlers a compensatory payment on milk purchased from outside California for distribution to producers within California and other interferences with market dynamics it creates a *de facto* discriminatory barrier to foreign milk. *West Lynn Creamery, Inc. v. Healy,* 512 U.S. 186 (1994).

In total, the scheme both discourages out-of-state milk from entering the California market and taxes such milk so as to subsidize and promote its domestic

dairy industry. The California program thus insulates California producers and manufacturers from interstate competition.

In short, California has created and administered a dairy program that clearly violates the Commerce Clause of the United States Constitution. To the extent that Congress created any exemption for California, thereby permitting CDFA to impose a burden on interstate commerce, that exemption was limited to the issue of California's milk identity standard, the sole issue addressed by Congress at 7 U.S.C. § 7253. The regulations governing the pricing and pooling of milk in California having the effect of discriminating against out-of-state milk should be declared unconstitutional by this Court.

ARGUMENT

I. California's milk pricing and pooling scheme constitutes a de facto barrier to the interstate transportation of raw milk.

The California regulations impose barriers on the interstate movement of raw producer milk into the state. First, only producers in California can own quota and participate in this higher price or the overbase price. Second, the subsidization of the manufacturing plants through the in-state pooling among producers and processors discourages out-of-state producers from selling their milk to manufacturing plants in California. Third, the compensatory payment required of Class 1 plants to the California pool on milk purchased from out-of-state producers subsidizes competing in-California producers and makes importation less attractive. These clearly fall within the prohibited trade practices this Court has struck down over the years and most recently in *West Lynn Creamery*.

In a tacit recognition of the interference, California argues, and the Ninth Circuit agreed, that Congress through its power over interstate commerce has exempted this pooling and pricing program from general prohibition of interference with interstate commerce.

II. Congress did not exempt California from the application of the Commerce Clause as it pertains to the pricing and pooling of raw milk.

The conclusion by the Ninth Circuit Court of Appeals below that "[a]mple evidence demonstrates that the pooling laws in general, and the 1997

amendments in particular, bolster California's composition requirements and are consistent with the protection provided by [7 U.S.C. § 7253]" is misplaced. *Ponderosa Dairy v. Lyons*, 259 F.3d 1148, 1154 (9th Cir. 2001). The relevant potion of 7 U.S.C. § 7253 provides that:

> Nothing in this Act or any other provision of law shall be construed to preempt, prohibit, or otherwise limit the authority of the State of California, directly or indirectly, to establish or continue to effect any law, regulation, or requirement regarding–
>
> (1) the percentage of milk solids or milk solids not fat in fluid milk products sold at retail or marketed in the State of California; or
>
> (2) the labeling of such fluid milk products with regard to milk solids or solids not fat.

7 U.S.C. § 7253.

This Court has repeatedly required that any Congressional grant that implicates the constitutional balance of power between the federal government and the states be unmistakably clear. *Raygor v. Regents of University of Minnesota*, 534 U.S. 533, 543 (2002) (*citing Will v. Michigan Department of State Police*, 491 U.S. 58, 65 (1989) (*quoting Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985))). Where Congress intends to permit state regulation that would otherwise violate the dormant Commerce Clause, the Court has required that exemption to be "expressly stated" and "unmistakably clear." *South-Central Timber Development*, 467 U.S. at 91.

Given the obvious effects California's regulations have on interstate commerce, the primary question

before the Court is mostly one of statutory construction rather than a determination of whether the California regulations in fact violate the dormant commerce clause. Accordingly, the proper course of action for the Court is to:

> begin with the language of the statute. The first step is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.

Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 450 (2002) (internal citations and quotation marks omitted).

As this Court has stated, the concept of an exemption "expressly stated" by Congress is not a nebulous concept. *South-Central Timber Development*, 467 U.S. at 91. The very fact that the court of appeals needed to rely on legislative history to support the continuance of the pooling and pricing guidelines suggests that the statutory language does not expressly remove these regulations from the Commerce Clause.

Reliance on legislative history to shed light on the meaning of a legislative enactment, especially in the situation where the text of the statute presents no ambiguity, not only contradicts the standard that this Court has laid down, but it opens the doorway to results unintended by the legislature. The text of 7 U.S.C. § 7253 concerns California's identity standards for milk. If Congress intended to implicate the pooling and pricing regulations, as well, it certainly knew how to draft language that clearly and expressly identified

those aspects of California's milk regulations. The extension of the exemption is not one for the judiciary to make.

Additionally, heavy reliance on the subjectiveness of legislative history upsets the reasonable expectations of participants in the legislative process. The amici actively participated in the debates and discussions that necessarily preceded the passage of the FAIR Act, which contained the provisions now codified at 7 U.S.C. § 7253. The involvement of the amici included offering language to the sponsors of the legislation, lobbying legislators, and maintaining an awareness of the FAIR Act's ramifications. To the amici, and to others who actively participate in the legislative process, there must be some semblance of predictability in the outcome. More specifically, interested persons should be able to expect that Congress says what it means and means what is says in a piece of legislation. Broadening the exemption through judicial review, takes this decision out of the political process and denies non-parties the ability to participate. Rewriting clear statutory language to encompass legislative history undermines the legislative process at all levels.

The statute here offers no indication that Congress intended to exempt California from a Commerce Clause challenge to state regulations that priced or pooled milk in favor of in-state producers and erected a barrier to the importation of raw milk from outside the state. As pointed out by the Petitioners and the Solicitor General, the provision at issue only concerns California's ability to create regulations that define the identity of fluid milk or relate to the labeling of fluid milk. That is the extent of the exemption. It touches on no other aspect of California's milk regulations.

Absent a crystal clear exemption, California's pricing and pooling provisions must fail as an impermissible restraint on interstate commerce in violation of Congress's reserved powers under the Commerce Clause.

III. Continued application of the California milk pricing and pooling schemes impede the sale of raw milk to processors in California by producers located in other states.

This Court's decision in *West Lynn Creamery* is applicable to this case. In *West Lynn Creamery*, the Court had before it a Massachusetts law which imposed an assessment on all milk, regardless of origin, sold to Massachusetts retailers. Two-thirds of the milk at issue originated out of the state. The entire benefit of the assessment, however, went to Massachusetts producers.

In this case, the CDFA imposes an assessment on imported milk to increase the blend price paid only on milk produced in California. The CDFA assessments levied on foreign milk are "effectively a tax which makes milk produced out-of-state more expensive. . . . Like an ordinary tariff, the tax is thus effectively imposed only on out-of-state products." *West Lynn Creamery*, 512 U.S. at 194-95.

Additionally, the method of blending higher priced classes with lower priced manufacturing milk permits the CDFA to reduce the minimum price for milk used in manufacturing to discourage out-of-state producers from coming into the market while still supporting its domestic supply. Foreign producers are not entitled to either of the blend prices of quota and overbase.

The CDFA regulations burden interstate commerce by increasing the cost of milk produced outside California, even though the additional fees provide no benefit at all to out-of-state milk producers. Milk from producers like Select and Continental is stripped of competitive advantage vis-a-vis California milk.

IV. The California regulations discriminate against citizens of foreign states in violation of the Fourteenth Amendment's Privileges and Immunities Clause.

The Court of Appeals erred in finding that the Privileges and Immunities of the individual farmers are not violated by the challenged regulations. The opinion below placed undue weight on the notion that the challenged regulations "are based on the location where milk is produced. The amendments do not, on their face, create classifications based on any individual's residency or citizenship." *Ponderosa Dairy*, 259 F.3d at 1156-57. The Petitioners properly state that facial discrimination against out-of-state residents is only one instance where privileges and immunities of citizens are infringed. Petition of Ponderosa Dairy for Writ of Certiorari, p. 19. *See also United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of Camden*, 465 U.S. 208, 216-18 (1984). In addition to the fact that California's pooling and pricing regulations discriminate against foreign dairies, the underpinnings of the entire California market rest on the explicit discrimination against out-of-state persons.

The "quota" system guarantees higher blend prices to the entities owning the quota. The regulations governing the transfer of quota and eligibility for ownership of quota effectively foreclose members of Continental and Select from ever receiving the higher quota blend price. The CDFA Pooling Plan defines producers as those persons producing milk in California from five or more cows. Pooling Plan, §104. The Petitioners accurately describe how the production location of milk is little more than a proxy for the citizenship of the producer. Petition of Ponderosa

Dairy for Writ of Certiorari, p. 18. To require that the milk be produced in California is tantamount to requiring that the producer be a citizen of California. Under the CDFA regulations, new producers who want to enter California's pool must first obtain a regulatory permit and continuously produce milk in the state of California for one year before making application for quota. Pooling Plan, § 451. This constitutes a true barrier to participating in the California milk market for all of Select's and Continental's members. Even if quota is obtained, the milk subject to the quota must still be produced in California. For Select and Continental, the "practical effect" is to eliminate any realistic possibility of obtaining quota and to provide an economic disincentive to sell milk to California handlers, thus preserving that market for California producers. That is not only a mercantile system in its purest form, but is a system that confers benefits and reserves benefits based on the citizenship of the participants.

CONCLUSION

California's dairy regulations clearly interfere with commerce between states and are therefore unconstitutional. California's policies adversely impact the ability of Select and Continental, as well as other dairy producers, to market milk both inside of and outside of California. The regulations are protectionist and stifle competition. While Congress has permitted California to create its own identity standard for fluid milk and to regulate labeling accordingly, the pooling and pricing regulations challenged in this case were never addressed by Congress and the application of the exemption granted should not be inferred. The "clear statement" standard governs the issue before the Court, and under that standard, California's regulations exceed the scope of the exemption granted at 7 U.S.C. § 7253 in violation of the Commerce Clause.

For these reasons, as well as those set forth in the briefs of the Petitioners, this Court should order the relief sought by Petitioners.

Dated: February 24, 2003

Respectfully submitted,
YALE & ASSOC. CO., LPA
* /s/Benjamin F. Yale
Kristine H. Reed
Ryan K. Miltner
102 W. Wapakoneta Street
P.O. Box 100
Waynesfield, OH 45896
419-568-5751

Attorneys for *Amici Curiae*
* Counsel of Record

Supreme Court, U.S.
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Nos. 01-950, 01-1018

IN THE

Supreme Court of the United States

HILLSIDE DAIRY, INC., A&A DAIRY, L&S DAIRY, AND MILKY WAY FARMS,

Petitioners,

and

PONDEROSA DAIRY, PAHRUMP DAIRY, ROCKVIEW DAIRIES, INC., AND DARREL KUIPER AND DIANE KUIPER, D/B/A D. KUIPER DAIRY,

Petitioners,

v.

WILLIAM J. LYONS, JR., SECRETARY, DEPARTMENT OF FOOD & AGRICULTURE, STATE OF CALIFORNIA, AND ROBERT TAD BELL, UNDERSECRETARY, DEPARTMENT OF FOOD & AGRICULTURE, STATE OF CALIFORNIA,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR WESTERN UNITED DAIRYMEN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

JOHN J. VLAHOS
Counsel of Record
S. ANNE JOHNSON
HANSON, BRIDGETT, MARCUS, VLAHOS & RUDY, LLP
333 Market Street, 23rd Floor
San Francisco, CA 94105
(415) 777-3200
Counsel for Amicus Curiae

170927

CP

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QUESTIONS PRESENTED

1. Whether the exemption granted by 7 U.S.C. § 7254 extends to California's pricing and pooling regulations; and

2. Whether an individual can state a claim for a violation of the Privileges and Immunities Clause where a state law distinguishes on its face upon whether a farm is located in-state or out-of-state and not between the "residency" or "citizenship" of the individuals that own or operate the farm.

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STATEMENT OF INTERESTS OF *AMICUS CURIAE*

Western United Dairymen is a non-profit trade association.[1] Its members are dairy farmers (producers) throughout California, from the Oregon to the Mexican borders. It members comprise approximately 1,100 of California's 1,900 total dairy producers. Many of its members hold varying amounts of quota[2] allotments under California's Milk Pooling Plan and many do not hold any quota. Western United Dairymen's members are vitally interested in and directly affected by the Milk Pooling Plan as their livelihoods are related, in large part, to its operation. The parties' written consents to Western United Dairymen's filing of an *amicus curiae* brief in support of Respondents are being lodged herewith.

STATEMENT OF FACTS

California uses a system of three interrelated programs to regulate milk that is produced, processed or sold in California. The Milk and Milk Products Act of 1947, Cal. Food & Agric. Code, §§ 32501-39912, and the regulations promulgated thereunder, establish standards for the composition of milk, including fluid milk. The Stabilization and Marketing Act, Cal. Food & Agric. Code, §§ 61801-62403, and the Stabilization and Marketing Plans established thereunder, set minimum classified prices to be paid for raw milk based upon the use to which the milk was put. The Gonsalves Milk Pooling Act, Cal. Food & Agric. Code §§ 62700-62756, and the Pooling Plan promulgated thereunder[3], implemented blended prices to

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1. No person or entity other than Western United Dairymen, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief, and this brief is authored entirely by counsel for the Western United Dairymen and counsel for a party did not author any part of this brief.

2. "Quota" is explained on pages 4 through 5, *infra*, and Appendix C, section A.

3. The current version of the Pooling Plan is available at *http://www.cdfa.ca.gov/mkt/mp/poolplan.pdf*.

California dairy farmers, also referred to as producers[4], and a producer pool equalization system. The Stabilization and Marketing Act and the Milk Pooling Act, and their respective Plans, together constitute the pricing and pooling component of California's integrated milk regulation system.

California's milk pricing and pooling system exists alongside a parallel Federal milk pricing and pooling system, established by the Agricultural Adjustment Act, reenacted by the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.* (hereinafter, the "Federal Marketing Act"), pursuant to which the U.S. Secretary of Agriculture may issue regional milk pricing regulations, referred to as "Federal Milk Marketing Orders", at the request of milk processors and/or producers within a marketing area. *See* 7 U.S.C. § 608c. As discussed, *infra*, California has the right to maintain, with the assent of its producers, its own state program and is not compelled to be a part of the Federal Milk Marketing Order system. Indeed, several areas of the United States, including California, have declined to be governed by Federal Milk Marketing Orders. *See* Appendix A, a map of the 11 current Federal Milk Marketing Orders established pursuant to 7 U.S.C. § 7255. Both California and the Federal government instituted their respective pricing systems to curb destructive trade practices that had developed in the dairy industry. *See, e.g., Lehigh Valley Cooperative Farmers, Inc. v. United States*, 370 U.S. 76, 79 (1962).

A. The California Stabilization and Marketing Act and Classified Minimum Pricing.

Since 1935, when it enacted the Young Act, California has set the minimum prices that milk processors must pay to California producers for raw milk. *See* Cal. Stats. 1935, c. 241

4. As used herein, the terms "California producer" or "California farmer" refer to milk production facilities, i.e. dairy farms, located within the State of California, regardless of the residence or citizenship of the entities or individuals operating or owning the farm. The term "in-state milk" refers to milk produced at a farm located in California, regardless of the residence or citizenship of the entities or individuals operating or owning the farm. "Out-of-state milk" refers to milk produced at a farm located outside of California, regardless of the residence or citizenship of the entities or individuals operating or owning the farm.

§ 1. The California Legislature adopted minimum pricing laws to stabilize the chaotic and abusive market conditions that previously existed in California's dairy industry. These conditions existed, in large part, because milk is produced daily, is perishable and must be marketed virtually daily, and is subject to demand cycles that regrettably do not coincide with the cow's production cycles. Recognizing that milk is a valuable agricultural product uniquely important to the health and welfare of consumers, the California Legislature adopted the minimum pricing system to ensure an adequate and continuous supply of pure fresh, wholesome milk available at reasonable prices to California's citizens and residents. *See* Cal. Food & Agric. Code §§ 61802, 61805; *Golden Cheese v. Voss*, 230 Cal. App. 3d 547, 553, 281 Cal. Rptr. 587, 589 (1991); *E.M. Consumer Corp. v. Christensen*, 47 Cal. App. 3d 642, 647, 121 Cal. Rptr. 177, 181 (1975).

As in Federal Milk Marketing Orders, the California Stabilization and Marketing Act and Plans classify the minimum prices for raw milk according to the ultimate use to which the processor puts the milk, e.g., fluid milk for consumption as a beverage, heavy creams, sour cream, ice cream, yogurt, cheese, butter, and milk powder.[5] The classifications are stratified essentially according the economic and societal value of the end product. *See* Cal. Food & Agric. Code §§ 61931-61937, 62062, 62079; *see, e.g.*, the N. Cal. Stab. & Mktg. Plan § 300.0. Currently, as in 1997, five classes of prices exist under the California Stabilization and Marketing Act (similar to the multiple classes in Federal Milk Marketing Orders), with Class 1 (primarily fluid milk) as the highest class, and then ranging downward to the lowest classes for products used for supply balancing purposes, Class 4a (butter and powder) and 4b (cheese). *See* Cal. Food & Agric. Code §§ 61932-61935.

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5. California actually applies its classified pricing structure to the components of milk – the butterfat, the solid-not-fats (e.g., protein, calcium, etc.) and, in the case of Class 1, the fluid carrier. Cal. Food & Agric. Code § 62075; *see, e.g.*, the Stabilization and Marketing Plan for Market Milk, as Amended, for the Northern California Marketing Area (the "N. Cal. Stab. & Mktg. Plan") § 300.0, *http://www.cdfa.ca.gov/dairy/stabplan/mcastabplan.pdf*.

B. The Milk Pooling Act and Pool Equalization Funds.

California's implementation of minimum classified pricing by itself was not sufficient to stabilize the California milk production industry. Because dairy farmers most desired the higher Class 1 price, a processor could exact abusive concessions from a dairy farmer in exchange for granting that farmer a Class 1 contract. Abuses by processors ranged from requiring under-the-table rebates, to more sophisticated devices, such as requiring a dairy farmer to lease or buy essentially unproductive land or to pay for in-retail store advertising, or to pay for services such as bulk tank rentals. Class 1 contracts became so desirable that they developed an independent value, and a "contract rights" system developed whereby producers would pay for such rights.

To correct the abuses the minimum classified pricing system fostered, California adopted the original Milk Pooling Act in 1967. The Milk Pooling Plan implemented thereunder further stabilized the California dairy industry by creating a pricing system for the payment of individual farmers that severed the direct connection between the price each dairy farmer received for its milk and the use made of the milk it sold. The Milk Pooling Plan accomplished this by pooling revenues of processor purchases of raw milk, deriving producer prices therefrom, and then requiring California processors to pay individual California dairy farmers one or more pool prices, regardless of the uses to which the milk was put by the processor, rather than the minimum classified prices themselves. The pooling system also created pool equalization funds to which the processors had to account for any difference between the amounts they paid the individual farmers and the minimum classified price of the milk the processors purchased. The system of pricing and pooling was similar, in many respects, to blended pricing and pooling systems adopted by Federal Milk Marketing Orders.

1. Payment to California Farmers.

When implementing the new system of pooling in 1969, California recognized the significant investment many California farmers had made in Class 1 contracts, and, rather

than create a single minimum blend price to pay farmers, as Federal Milk Marketing Orders did, California created a multi-tier pricing system. In 1969, each producer in California was issued an allotment equal to 110% of such producer's historical Class 1 sales, measured in pounds, or "quota." *See* Cal. Food & Agric. Code § 62707. To further equalize returns among producers additional quota was issued to California producers in 1978. *See* Cal. Food & Agric. Code § 62707.1.

For the month of December 2002, only 68, or 3.4% of California's total of 1,984 producers had over 95% (hereinafter, for simplicity referred to as "100% quota holders") of their production covered by quota; 1,517, or 76.5%, had 50% or less of their production covered by quota; and 646, or 32.6%, had no quota at all. Measured in terms of pounds of solids, only 27% of California's December 2002 production was covered by quota. CAL. DEPT. OF FOOD AND AGRIC. ("CDFA"), MILK POOLING BRANCH, REPORT 120-7, 1/24/03, at 41, attached hereto as Appendix B. California producers can buy and sell their quota, and quota has a substantial market value due to the costs incurred to obtain it and the higher price to which quota entitles a farmer, as discussed below.

Since 1994, California processors have paid individual dairy farmers one of two different minimum blended prices for the raw milk they purchased: the higher "quota price" or the lower "overbase price". *See* Milk Pooling Act §§ 62750-62756; Pooling Plan § 906. While the methods for determining the quota price and the overbase price have changed over time, the pricing system operates so that the monthly Class 1 price is always, with a few exceptions, higher than the quota price, which is higher than the overbase price.[6]

A California processor pays a California dairy farmer the quota price for the pounds of milk the farmer sells that is equal to his quota allotment, and the overbase price for those pounds not covered by his quota allotment – regardless of the use to

6. Please see Appendix C, section A, attached hereto, for a description of the two different methods that have been used to determine the quota and overbase prices.

which the processor puts the milk, e.g., fluid milk (Class 1) or cheese (Class 4b). Pooling Plan § 1001.[7]

2. Obligations of California Processors to the Pool.

The Pooling Plan requires a California processor to account to the pool equalization funds for raw milk purchases based on the use to which such raw milk was put and the classified minimum price for such use. *See* Pooling Plan §§ 900, 1003 and 1004. The purpose of the fund is to account for the difference between the direct payments processors make to individual farmers and the minimum classified prices for which the processor is liable.

For example, a processor operating a Class 1 plant, which processes all of the raw milk purchased for use as fluid milk, must account to the pool in an amount determined by multiplying the total pounds of raw milk purchased by the Class 1 price, which, for a Class 1 plant, is effectively the "in-plant blend price." The Class 1 plant will have paid its producers for the raw milk at the overbase price, the quota price, or some combination thereof, depending on the amount of quota, if any, held by the producers. Since the Class 1 price is, with only a few past exceptions, higher than the quota and overbase prices, the Class 1 plant will owe the pool the difference between the Class 1 price and a credit equal to the total amount paid to the producers.

On the other hand, a plant that processes the raw milk it purchases for cheese (Class 4b) must account to the pool in an amount determined by multiplying the total pounds of raw milk purchased by the Class 4b price. Again, the Class 4b plant will have paid its producers at the overbase price, the quota price, or some combination thereof, depending on the amount of quota, if any, held by the producers. If, as is the case with few exceptions, the total amount the Class 4b plant paid to

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7. Accordingly, a farmer that owned quota equal to his entire production volume would receive the quota price on all of the milk he sells; a farmer that owned quota equal to 50% of his entire production volume would receive the quota price on 50% of the milk he sells, and the overbase price on the remaining 50% of milk sold; and a farmer that did not own any quota would receive the overbase price on all milk sold.

producers is greater than the amount for which it must account to the pool, the pool will pay the Class 4b plant the difference.

C. The Challenged 1997 Amendment to the Milk Pooling Plan.

In 1997, the Respondent California Secretary of Agriculture modified the Milk Pooling Plan to address a significant, and unintended, artificial regulatory incentive the previous Milk Pooling Plan created for California processors to purchase milk for Class 1 use from out-of-state producers. Until 1997, a California Class 1 processor that purchased out-of-state milk accounted to the pool at the Class 1 price but could deduct such sales from its pool obligation at the plant's in-plant blend price. Since the in-plant blend price equaled the Class 1 price, this effectively zeroed out the processor's obligation to the pool. Due to the difference in the pool credits a Class 1 processor received for in-state and out-of-state milk, a Class 1 processor would almost always owe the pool the difference between the Class 1 price and the amount paid to California producers, but would never owe the pool money for milk purchased from out-of-state. Accordingly, a California Class 1 processor increased its profits when it paid an out-of-state producer something less than the Class 1 price, even a price, as typically was the case, at least equal to and often above the California quota price.

As a result, prior to the 1997 Amendment, the Pooling Plan treated *every* out-of-state producer better than *any* California producer. Due to the artificial regulatory incentive, out-of-state producers could command prices for Class 1 milk at least equal to, and possibly more than, the California quota price, even though the out-of-state producer had never paid for any quota. At the same time, *no* California farmer could receive more than the quota price, and only that small number (3.4%) of California farmers that held virtually 100% quota could achieve the quota price. The vast majority (96.6%) of California producers would receive something less than the quota price—either a blend of the quota and overbase price, depending on the amount of their quota holdings, or, if they were among the 32.6% of California farmers that held no quota,

the overbase price. Therefore, prior to the 1997 Amendment, the *Pooling Plan itself*—rather than any economic competitive advantage possessed by out-of-state producers—created both the motivation for processors to buy Class 1 milk from out-of-state and the opportunity for out-of-state producers to command higher prices than California farmers. Indeed, from a purely economic standpoint, absent the favorable regulation, out-of-state producers were at a competitive disadvantage because of greater hauling costs.

The unfairness was so great and the advantage offered to "out-of-state" milk so significant that, despite the added *double*-haul costs, some California producers found it to their economic advantage to "round-trip" their raw milk, that is, to ship it out of California and then bring back into California an equivalent amount of milk or sometimes the very same milk. A California "round-tripper" could receive a price somewhere in between the quota price and the Class 1 price for the milk brought back in from out-of-state, whereas if he shipped the same amount of California milk directly to the same processor for the same use, he would receive, at best, the quota price and, much more likely, a blend of the quota and overbase prices, or perhaps just the overbase price. The California Department of Food and Agriculture noted that, by encouraging "round-tripping", the "existing regulatory distortion" in the pre-1997 Pooling Plan "fosters the inefficient movement of milk . . . with significant increases in transportation and labor costs, expanded environmental costs and introduced a speculation factor. . . ." STATEMENT OF DETERMINATION REGARDING THE PROPOSED AMENDMENTS TO THE POOLING PLAN FOR MARKET MILK BASED ON PUBLIC HEARINGS HELD ON DECEMBER 6, 1996, AND FEBRUARY 4, 1997, at 48. The CDFA concluded that, contrary to the dictates of Section 61802(e) of the Food and Agricultural Code, by fostering the wasteful and inefficient practice of "round-tripping", the existing regulation did not "'*promote . . . intelligent marketing* . . . [nor tend] . . . *to eliminate economic waste*' and thus, is not in the public interest." *Id.* at 65.

To reduce the artificial incentive the then-existing Milk Pooling Plan created for Class 1 processors to supply their

needs from out-of-state milk and to eliminate "round-tripping", the 1997 Amendment to the Pooling Plan, provided that, for "other source" milk, which includes out-of-state milk, the processor would receive a credit against its obligation to the pool equal to the lesser of the in-plant blend price or the quota price. Pooling Plan § 900(d). Since the in-plant blend price for Class 1 plants is equal to the Class 1 price, as a practical matter, the credit given to Class 1 plants for out-of-state milk is the quota price.

In actuality, the "quota price" credited to California processors for out-of-state milk purchases is *greater* than the quota price credit processors receive for in-state milk. First, to determine the prices paid to California producers, the total of all transportation allowances paid to California farmers and transportation credits given to California processors is deducted, thus reducing the quota price received by California quota holders.[8] However, an adjustment called the Pool Price Modification Rate adds these amounts back into the "quota price" that California processors receive as a credit for out-of-state milk. Thus, processors receive an enhanced credit for milk purchased from out-of-state, greater than the credit for purchases of in-state milk. Pooling Plan §§ 132, 900(d). In addition, a majority of California producers do not receive the full quota price because they are subject to Regional Quota Adjusters, which are deductions from the quota price established to reflect part of the location value of milk and historical differences of the costs of production within the State. *See* Pooling Plan §§ 910, 910.1, and 914.

Significantly, the 1997 Amendment did not entirely eliminate the artificial incentive for California Class 1 processors to purchase out-of-state milk. Under the 1997 Amendment, because a California Class 1 processor receives a credit for the out-of-state milk somewhat higher than the quota price it pays for in-state milk, that processor has *a somewhat greater* incentive to purchase milk from *any* out-of-state producer as from one of the only 3.4% of California farmers that hold 100% quota. Furthermore, a California Class

8. See Appendix C, section B, for an explanation of transportation allowances and credits.

1 processor has *a substantially greater* incentive to purchase milk from *any* out-of-state producer than from the remaining 96.6% of California dairy farmers, who are entitled to receive a price for their milk somewhere between quota and overbase. These incentives exist because the Class 1 processor profits from the difference between the enhanced quota credit it receives for out-of-state milk and the amount it actually pays to the out-of-state producer. Thus, the 1997 Amendment always positions every out-of-state producer, none of whom has paid for quota, somewhat better than small percentage of California producers who have paid for quota to cover 100% of their production, and far better then the overwhelming majority of California producers.

Actual experience since adopting the 1997 Amendment demonstrates that, indeed, the 1997 Amendment has not imposed a barrier to the importation of out-of-state milk into California for Class 1 uses. On the contrary, the incentive to Class 1 processors to purchase out-of-state milk still exists, as evidenced by a continuing increase of shipment of out-of-state milk to Class 1 processors. In January 2000, out-of-state milk represented only 1.65% of the total production received by processors in California, but 8.48% of all the Class 1 solids-not-fat utilized in California. Since then, importation of out-of-state milk for Class 1 uses has increased steadily so that as of December 2002, it represented 19.2% of California Class 1 solids usage, 226% of what it was in January 2000. *See* CDFA: BULK MILK SHIPPED INTO CALIFORNIA POOL PLANTS FROM OUT-OF STATE SOURCES, Appendix D.

SUMMARY OF ARGUMENT

The merits of Petitioners' Commerce Clause and Privileges and Immunities Clause claims are not before the Court, as both Petitioners and the Solicitor General concede. However since both Petitioners and certain *amici*, including the Solicitor General, nonetheless extensively argue the merits, *Amicus* Western United Dairymen submits that neither claim is valid.

The challenged 1997 California Pooling Plan Amendment is part of a valid exercise of California's police power designed to insure the citizens of California both an adequate supply of

milk and a high quality of milk by means of a complex regulatory system encompassing minimum dairy farmer prices, revenue pooling and standards of composition.

The challenged Amendment neither discriminates against nor burdens interstate commerce. It is designed to address an unintended incentive created by California's Pooling Plan provisions regarding the accounting by California processors to the California pool for purchases for Class 1 (fluid) uses that favors the purchase of out-of-state milk over California milk. That incentive was not the result of any economic or competitive advantage possessed by out-of-state dairy farmers, but rather solely the result of the regulatory quirk that favored out-of-state producers.

The 1997 Amendment merely reduces the artificial regulatory incentive and still treats out-of-state dairy farmers somewhat more favorably that the 3.4% of California producers owning 100% (or almost 100%) quota, and much more favorably than the remaining 96.6% of California producers. The Amendment is neither a subsidy nor a tax. Petitioners have no Constitutional entitlement to the continuation of a California regulatory scheme that is skewed in their favor.

California's pooling and pricing laws and regulations and its compositional requirements are part of a complex regulatory scheme designed to assure both the content and the adequacy of supply of milk to California's consumers. The Ninth Circuit correctly found that California's pooling and pricing regulations and those concerning the content of milk are closely related and that therefore all are within the exemption provided by 7 U.S.C. § 7254.

And, whatever section 7254 exempts—be it California's pooling and pricing laws and regulations, as well as composition and labeling requirements (as urged by Respondents and this *Amicus*) or only composition and labeling (as urged by Petitioners)—the exemption extends to foreclose Commerce Clause scrutiny. Both the language of the statute and the context from which it arose clearly indicate that Congress intended to give California the freedom to adopt its own regulatory standards. Accordingly, the Ninth Circuit

correctly interpreted the term "any other provision of law" to encompass the Commerce Clause of the Constitution. Any other interpretation would render the exemption granted virtually meaningless. However, should this Court interpret the statute as exempting only composition and labeling, there would be no need to reach the Constitutional issue of whether exemption from the Commerce Clause was intended.

The 1997 Amendment does not discriminate, on its face or in practical effect (assuming that is a viable Privileges and Immunities criterion), on the basis of residency or citizenship. In the first place, as indicated in the discussion on the Commerce Clause, it does not discriminate against out-of-state interests at all. Indeed, out-of-state producers are treated more favorably than California producers. Second, the Amendment does not make a distinction on the basis of state residency or citizenship, either on its face or in its practical effect. Out-of-state residents who own dairy farms in California are treated the same as California residents owning dairy farms within the state. And, conversely, California residents owning dairy farms outside the state who sell milk from those farms to California processors for Class 1 uses are treated identically to out-of-state residents who do likewise.

ARGUMENT

I. Whether Or Not California's Milk Pooling Plan, As Amended In 1997, Violates The Dormant Commerce Clause Or The Privileges And Immunities Clause Is Not Before The Court.

The questions before the Court are: (A) whether the exemption granted by 7 U.S.C. § 7254 extends to California's pricing and pooling regulations; and (B) whether an individual can state a claim for a violation of the Privileges and Immunities Clause where a state law distinguishes on its face upon whether a farm is located in-state or out-of-state and not between the "residency" or "citizenship" of the individuals that own or operate the farm.[9] Western United Dairymen

9. Western United Dairymen contends in Section III, *infra*, that 7 U.S.C. § 7254 does, in fact, exempt California's pricing and pooling system from (Cont'd)

concurs with Petitioners that the merits of the Constitutional claims are not before the Court.[10] Indeed, should the Court decide to reverse the decision below on the Questions Presented, Western United Dairymen urges that the Court make no predetermination of the Constitutional questions. Rather, as suggested both by Petitioners and the Solicitor General (*Brief for Petitioners*, hereinafter "*PB*", at 5-6; *Petition for Certiorari Brief for the United States*, filed Dec. 4, 2002, at 10-11, 32-34), if the Court were to reverse the Ninth Circuit, the cases ought to be remanded to the trial courts below for their consideration in the first instance since the Constitutional issues have not yet been fully developed.

Nonetheless, since—despite their concession that the Constitutional questions are not before the Court—both Petitioners (*PB* at 34-49) and various *amici* have stridently argued that the challenged 1997 Amendment to California's Pooling Plan violates both the Commerce and the Privileges and Immunities Clauses, Western United Dairymen feel it is incumbent upon them to demonstrate that the 1997 Amendment is a valid exercise of California's police powers that does not violate either Constitutional provision, even if they were to apply to California's pricing and pooling system.

II. California's Milk Pricing And Pooling System Is A Valid Exercise Of Its Police Powers To Foster Its Dairy Industry.

To foster its domestic dairy industry, California has exercised its right to maintain its own regulatory system governing milk production and pricing. The power of a state to regulate milk pricing is well-established. *See, e.g., Penn Dairies, Inc. v. Milk Control Comm'n of Pa.*, 318 U.S. 261, 278-279 (1943) (upholding the application of Pennsylvania's minimum pricing law to purchases by the federal

(Cont'd)

the Commerce Clause; in Section IV, *infra*, that because the 1997 Amendment does not discriminate against citizens of other states it does not violate the Privileges and Immunities Clause; and, therefore, that the Ninth Circuit's decision should be upheld.

10. Petitioners so concede on pages 4 through 6 of their brief on the merits.

government); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 611 (1937) (citing a line of cases upholding "[t]he power of a state to fix a minimum price for milk"). Furthermore, in the words of this Court, "[n]o one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984).

To curb destructive trade practices and stabilize its dairy industry, California first exercised its undisputed authority to regulate milk production and pricing in 1935 by enacting the Young Act. California has fostered its dairy industry through regulation ever since, and currently maintains three complex integrated regulatory programs: standards of composition of milk, including fluid milk, under the Milk and Milk Products Act of 1947, and minimum prices to be paid to producers and producer equalization pools under the Stabilization and Marketing Act and the Milk Pooling Act, and their related Plans. The California Legislature adopted the minimum pricing system to ensure an adequate and continuous supply of pure, fresh, wholesome milk available at reasonable prices to California's citizens and residents. Accordingly, the California Supreme Court has repeatedly upheld the minimum pricing system as an appropriate exercise of the State's police powers. *See, e.g., Jersey Maid Milk Prod. Co. v. Brock*, 13 Cal. 2d 620, 636-638, 91 P.2d 577, 587-588 (1939).

As California acted in the 1930's to stabilize its dairy industry through regulation, the Federal government enacted a parallel regulatory system. Responding to similar destructive trade practices, the Federal government, in 1937, implemented the Federal Marketing Act. The Federal government's entry into the field of milk pricing regulation did not pre-empt a state's authority to regulate its own dairy industry (*see Parker v. Brown*, 317 U.S. 341, 354 (1943)); rather, the Federal Marketing Act authorizes the U.S. Secretary of Agriculture to issue regional Federal Milk Marketing Orders at the behest of handlers and/or producers within a marketing area.[11]

11. Notably, Congress has expressly granted California dairy producers the right to elect entry into a separate federal milk marketing order governing the State of California. *See* 7 U.S.C. § 7253(a)(2).

California is one of several areas of the United States that are not governed by Federal Milk Marketing Orders. *See* Appendix A.

Under the *Penn Dairies* and *Highland Farms Dairy* line of cases, *Bacchus*, and the *Jersey Maid* line of cases, *supra*, California clearly has the authority to foster its domestic dairy industry through regulation. Furthermore, as *Parker*, *supra*, makes clear, California's legitimate exercise of its police power to regulate its own dairy industry is not curtailed by the existence of the parallel Federal system, since California's dairy producers have not opted into the Federal system.

Petitioners, and the *amici* supporting them, assail California's milk pricing and pooling system on the grounds that: "California was able, through pooling, to bring about blend prices that were high enough to provide adequate income to dairy farmers to encourage growth in milk production, while also providing . . . an incentive to locate manufacturing facilities in California" (*PB* at 37); the system "is not tempered by the law of supply and demand" (*Brief on the Merits for Amici Curiae Nev., Minn., Mont. Or., Wash., and Wis.* at 2); and that it "encourage[s] its in-state dairy producers to expand production" (*Id.* at 6.); and other similar grounds. These attacks are wholly without legal merit. They amount to nothing more than a claim that the Federal judiciary should restrict California's milk regulation system simply because it is successful and its success has enabled California to become a national player in the dairy industry. California is entitled to continue to exercise its police powers to regulate its dairy industry and to foster its growth, within the bounds of Federal law to which it is subject.

III. The 1997 Amendment of California's Milk Pooling Plan Does Not Violate The Dormant Commerce Clause Or The Privileges And Immunities Clause.

A. The 1997 Amendment Does Not Discriminate Against Interstate Commerce Or Citizens Of Other States.

California's Milk Pooling Plan, as amended in 1997, does not discriminate against interstate commerce or citizens of other states or give California farmers an advantage in the

interstate marketplace. Indeed, even as amended, California's pricing and pooling system places milk that is produced by farms outside of California in a better position than it does milk produced in California, creating greater incentives for the purchase of Class 1 milk from out-of-state and for equal or higher payments to out-of-state farmers.

As set forth in Section II.A above, "[n]o one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry." *Bacchus, supra*, 468 U.S. at 271. A State is prohibited, however, from "plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330-331 (1996). Accordingly, a State may not discriminate against interstate commerce, i.e., impose "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys. Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). A State, however, may impose a "compensatory tax" on interstate commerce if it is "designed simply to make interstate commerce bear a burden already borne by intrastate commerce." *Associated Indus. of Mo. v. Lohme*, 511 U.S. 641, 647 (1994).

1. The 1997 Amendment Reduces An Artificial Regulatory Incentive Favoring The Purchase Of Out-Of-State Milk Over In-State Milk.

As set forth in detail on pages 7 through 8, *supra*, prior to 1997, the Milk Pooling Plan treated out-of-state milk more favorably than in-state milk for purposes of a California processor's obligations to the pool. This more favorable treatment permitted California processors to pay more to all out-of-state producers than to the best paid California producers, but end up paying less for the milk. It, thus, created a strong incentive to purchase milk for Class 1 use from out-of-state and placed *every* out-of-state producer in a better position than *any* California producer, to the point of encouraging the wasteful and destructive practice of "round tripping" by California producers.

California's pricing and pooling system, which was intended to stabilize the industry and to promote public health and welfare, thus harbored a perverse unintended incentive that could be, and was, manipulated to destabilize the industry and to engage in marketing practices that contravened the public interest. In response, the Respondent California Secretary of Agriculture implemented the 1997 Amendment.

California is not alone in its need to close this regulatory loophole to achieve "competitive parity" between pool (in-state) and non-pool (out-of-state) milk. The parallel Federal pricing and pooling system faces the same problem – the need to "neutralize, compensate for and eliminate the artificial economic advantage for non-pool milk which necessarily is created by the classified pricing and pooling of pool milk under the order." *Lehigh, supra*, 370 U.S. at 84. Furthermore, just as States are prohibited by the dormant Commerce Clause from imposing discriminatory burdens on interstate commerce, the U.S. Secretary of Agriculture is prohibited by statute from imposing "trade barriers" on entry of commerce into a Federal Milk Marketing Area.[12]

In *Lehigh*, the U.S. Secretary of Agriculture attempted to achieve competitive parity between pool milk under the New York-New Jersey Milk Marketing Order and non-pool (i.e., out-of-area) milk by requiring a handler of non-pool milk to make a "compensatory payment" to the pool. Farmers in the New York-New Jersey Marketing area received a uniform minimum blend price, rather than the minimum classified prices. Nonetheless, the U.S. Secretary of Agriculture, imposed on processors that purchased non-pool milk a "compensatory payment" in an amount equal to the difference between the minimum prices for the highest and for the lowest use classifications, i.e., Class I and Class III prices, under the New York-New Jersey Milk Marketing Order. *Lehigh, supra*, 370 U.S. at 83.

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12. Section 608(c)(5)(G) of the Federal Marketing Act provides: "No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

This Court struck down the Secretary's regulation as erecting an impermissible "trade barrier" because it would "in all but rare instances, nullify any competitive advantage that non-pool milk could have" since a handler would have an incentive to bring non-pool milk in the area only where its cost was less than the minimum price for the lowest use, Class III. *Id.* at 84. In striking down, the compensatory payment in *Lehigh*, however, this Court suggested that to achieve competitive parity between pool milk and non-pool milk a payment equal to the difference between the Class I price and the blend price would be acceptable. *Id.* at 86-87 n.13.

Petitioners wrongly cite the *Lehigh* decision to support their challenge, disingenuously stating that the 1997 Amendment "closely resembles the credit and compensatory payment . . . condemned as a trade barrier in *Lehigh*." *PB* at 40. To the contrary, the 1997 Amendment's adjustment of the credit that California Class 1 processors receive for their purchase of out-of-state raw milk is quite unlike the impermissibly discriminatory payment required by the U.S. Secretary of Agriculture in *Lehigh*. Due to the draconian payment required in *Lehigh*, *no* non-pool farmer would be able to enter the market of the Marketing Area unless it could afford to sell its milk for the Class III price or less. At the same time, *all* of the pool farmers were entitled to obtain the higher uniform blend price. In other words, the impermissible compensatory payment imposed in *Lehigh* had the effect of placing *every* non-pool producer in a worse position than *all* of the pool producers—in stark contrast to the 1997 Amendment, which still places *every* out-of-state producer in a *better* position than *any* in-state producer. Indeed, to be comparable to the compensatory payment struck down in *Lehigh*, the 1997 Amendment would have had to credit the processor with payment of only the 4a or 4b price (the lowest minimum classified prices in California) and require the processor to pay the difference between the Class 1 price and the Class 4a or 4b price to the pool.

The 1997 amendment is, in fact, more comparable to the method of achieving "competitive parity" that this Court, in *Lehigh*, suggested was acceptable and which the Seventh

Circuit upheld in *County Line Cheese Co. v. Lyng*, 823 F.2d 1127 (1987)—having the Class 1 processor account to the pool for the difference between the Class 1 price and the uniform blend price actually paid to the pool producers. The Seventh Circuit in *County Line Cheese* determined that the payments for non-pool milk required under the Indiana Federal Milk Marketing Order "do not present a trade barrier", but simply "erase an artificial advantage gained by the way the price supports work." *County Line Cheese, supra*, 823 F.2d at 1134. In upholding the Indiana Federal Milk Marketing Order, the Seventh Circuit reasoned that "[n]or do the regulations at issue here prescribe minimum prices that handlers pay for nonpool milk; if anything, they act to lower the maximum amount that handlers will be willing to pay for nonpool milk." *Id.* at 1135.

Notably, the 1997 Amendment is more even-handed than the method for achieving competitive parity approved in *County Line Cheese*. First, the 1997 Amendment has set the credit for out-of-state milk at the *highest* price that only a handful (3.4%) of California producers receive. Furthermore, in actuality, as Petitioners concede, the credit a processor receives for the purchase of out-of-state milk "is actually a modified quota price . . . approximately 3 cents higher than the quota price." *PB* at 40 n.5. Thus, rather than presenting a trade barrier, the 1997 Amendment actually treats every out-of-state producer *somewhat better than* the best positioned California producers, the handful that have paid for quota to cover 100% of their production.

Furthermore, actual experience after the 1997 Amendment demonstrates that, indeed, the 1997 Amendment did not impose a barrier to the importation of out-of-state milk into California for Class 1 uses. The continuing incentive to Class 1 processors to purchase out-of-state milk, in fact, has fueled an increase in shipments of out-of-state milk to Class 1 processors, with such shipments increasing by 116% in just the past three years.

2. The 1997 Amendment Does Not Benefit California Farmers Through A Direct Subsidy Funded By Out-Of-State Milk.

Petitioners wrongly claim that the 1997 Amendment "violated" *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, (1994) by "subject[ing] out-of-state dairy farms to disparate treatment that benefited California farmers at the expense of out-of-state farmers." *PB* at 41. In *West Lynn Creamery*, Massachusetts fluid milk dealers challenged a Massachusetts pricing order that required them to pay a tax on all fluid milk they sold to Massachusetts retailers – regardless of the origin of the milk even though out-of-state milk accounted for two-thirds of the milk sold. This uniform tax was imposed on top of the minimum price set by the Federal Milk Marketing Order governing the Massachusetts farmers. The tax was then distributed to Massachusetts dairy farmers, each Massachusetts producer receiving "a share of the total fund equal to his proportionate contribution to the State's total production of raw milk." *Id.* at 191. The tax was implemented to directly subsidize Massachusetts farmers, who were not able to turn a profit at the minimum price set by the Federal Marketing Order governing them. *Id.* at 191 n. p.5. The pricing order "allow[ed] Massachusetts dairy farmers who produce at a higher cost to sell at or below the price charged by lower cost out-of-state producers." *Id.* at 194-195. The Court in *West Lynn Creamery* struck down this otherwise non-discriminatory tax because, when coupled with the subsidy of in-state farmers, it created a discriminatory burden on out-of-state milk:

> [T]he tax on in-state milk, unlike that imposed on out-of-state milk does not impose any burden on in-state producers, because in-state dairy farmers can be confident that the taxes paid on their milk will be returned to them via the Dairy Equalization Fund. *Id.* at 199 n.16.

West Lynn Creamery presents an entirely different set of facts than the case at bar and is simply inapplicable. By implementing the 1997 Amendment, California is not imposing a tax on the sale of milk by processors to retailers

that is then distributed directly to domestic farmers in an attempt to enable farmers to price their milk as low as the milk of their out-of-state competitors. To the contrary, Petitioners complaint is that out-of-state farmers are no longer able to command as *high* a price for their milk as previously under California's pricing and pooling system, not that California has eliminated their ability to undersell California farmers.[13] The 1997 Amendment is neither a tax nor a subsidy. It simply reduces the regulatory incentive favoring the purchase of Class 1 milk from out-of-state farmers at a higher price than in-state farmers are paid by equalizing the pool credits that Class 1 processors receive for the purchase of out-of-state and in-state milk. There is no tax on anyone and no subsidy to California farmers, who are paid directly by the processors and do not receive any payments from the pool. And to the extent that the operation of the Amendment enhances the quota price, out-of-state producers benefit equally as they are enabled to receive the higher quota price.

B. California Has Not Imposed An Impermissible Minimum Pricing Requirement On The Purchase Of Out-Of-State Milk.

As discussed above, Petitioners' fundamental complaint is not that California has placed a floor under the ability of out-of-state producers to undersell California producers, but that the 1997 Amendment has placed a *ceiling* on the amount by which the price the out-of-state producers receive can *exceed* the price paid to individual California farmers. Like the requirement in *County Line Cheese* that processors account to the pool for out-of-state milk, the 1997 Amendment does not "prescribe minimum prices that handlers pay for nonpool milk"; rather it acts to "lower the maximum amount that handlers will be willing to pay for nonpool milk." *County Line Cheese, supra,* 823 F.2d at 1135. Accordingly, Petitioners' reliance on *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) is misplaced.

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13. Indeed, Petitioners are explicit about the true nature of their claim, objecting that "under the 1997 amendments, . . . no longer may the out-of-state dairy farmer receive payment of the full value of his transaction – the plant blend price" (i.e., the Class 1 price). *PB* at 39.

In *Baldwin*, the Vermont producers challenged the imposition of New York's minimum price requirements on the Vermont producers because it prevented them from using an *actual economic edge* – their ability to produce milk more cheaply than New York farmers – to undersell New York farmers. Consistent with *Baldwin*, California's Pooling Plan, even as amended in 1997, does not impose a minimum pricing requirement on any interstate transaction. Even after 1997, out-of-state dairy farmers are free to undersell California dairy farmers. Nothing in *Baldwin* requires that a State maintain a regulatory incentive that favors the purchase of out-of-state milk at the same time that it maximizes the price an out-of-state farmer can command.

Significantly, cases such as *Baldwin* and *West Lynn Creamery* deal with regulations that erect barriers to importation of out-of-state or out-of-area milk by producers who have an economic competitive advantage due to cheaper production costs. The 1997 Amendment simply does not impose such a barrier. Out-of-state producers are free to undersell California milk if they have a true economic competitive advantage, as opposed to a regulatory advantage. Petitioners' claim is at its core that they have a Constitutional entitlement to a California regulatory system that guarantees them an opportunity to achieve or approximate the *highest* price under California's minimum classified pricing system, the Class 1 price, a benefit no California producer receives.[14]

C. California Is Not Required To Extend To The Interstate Sale Of Milk The Same Economic Advantages It Gives Its Domestic Industry.

Under the dormant Commerce Clause, California may provide benefits to domestic industry that it does not provide to out-of-state interests. "The Commerce Clause does not

14. Petitioners have provided in an Appendix a June 19, 1997, opinion of the Legislative Counsel of California. That opinion is off the mark as it is based on the totally erroneous premise, that, under the Amendment, out-of-state producers could receive no more or less than the price paid in-state producers. CAL. LEGIS. COUNSEL OPINION, MILK POOLING #12484, JUNE 19, 1997, at 1a, 6a of Petitioner's Appendix. Nothing in the 1997 Amendment prohibits an out-of-state producer from undercutting the prices paid to California dairy farmers.

prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description in connection with the State's regulation of interstate commerce." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988). For example, "(d)irect subsidization of domestic industry does not ordinarily run afoul of that prohibition." (*Id.*)

Petitioners complain that farms located out-of-state are discriminated against because California does not guarantee them the benefits of "quota". Petitioners lament, "[T]he out-of-state farmer can never receive the true 'benefit' of quota, which includes the assurance of receiving the blend price without regard to competition or plant destination." *PB* at 41. In characterizing the "assurance of receiving" the quota price as a "*benefit*", Petitioners turn *Baldwin, supra*, on its head, as it *struck down* the imposition of minimum pricing requirements on interstate commerce as an impermissible *burden*. Petitioners further object that out-of-state farmers are denied the benefit of quota's "asset value", seeming to claim free entitlement to an asset for which California farmers have paid a substantial price,[15] as Petitioners acknowledge when they state that quota is sold on the market for at least $500 per pound of solids. *Id.* Last, Petitioners complain that out-of-state producers cannot receive the transportation allowance that a small number of California's producers receive, the cost of which all California's dairy farmers pay through a deduction from the prices they receive. Their claim to the transportation allowance is most ironic since Petitioners have conceded that the credit processors receive for out-of-state milk has been adjusted "so that out-of-state milk is not required to fund the transportation allowance program." *PB* at 40.

In addition to disregarding entirely a State's right, under *Bacchus* and *Limbach, supra*, to implement policies and supports directed at its own industry, Petitioners assert an entitlement

15. The 1969 grant of quota in the original Pooling Plan was in recognition of the consideration producers historically paid for Class 1 contracts, either directly by payment for "contract rights" or indirectly through various actual or disguised rebates. *See* p. 4, *ante*. Furthermore, after issuance of additional quota in 1978, most California producers have sold and bought quota as cash investments.

to benefits for which they have never paid and transmute what is otherwise considered an unconstitutional burden into a Constitutional right.

In short, under California's pricing and pooling plan before 1997, *every* out-of-state farmer was better positioned than *any* of California's farmers because an out-of-state farmer could obtain a higher price for Class 1 milk, at less cost to the processor, than any California farmer could obtain. The 1997 Amendment creates a more even playing field by reducing, but not eliminating, the purely regulatory advantage that California's pricing and pooling system gave out-of-state farmers—by treating them as well as, even somewhat better than, California's best paid producers, and far better than the vast majority of its producers. Petitioners' challenge to the 1997 Amendment seeks to turn the Commerce Clause and the Privileges and Immunities Clause on their heads because they invoke these Constitutional provisions not to protect themselves from a discriminatory burden placed on interstate commerce but to demand that California continue to extend them far better treatment than it does any of its own farmers.

IV. 7 U.S.C. § 7254 Exempts California's Milk Pricing And Pooling Regulations From The Dormant Commerce Clause.

A. The Court Should Uphold The Decision Of The Ninth Circuit In The Case At Bar And In *Shamrock*.

1. Section 7254 Applies To California's Pricing And Pooling Regulations.

Western United Dairymen concur with the Respondent California Secretary of Agriculture's position, as set forth in its brief on the merits, that the exemption from all provisions of Federal law granted pursuant to 7 U.S.C. § 7254 applies to California's pricing and pooling regulations. As discussed previously, California uses a system of three interrelated programs to regulate milk: standards of composition under the Milk and Milk Products Act; classified minimum producer pricing under the Stabilization and Marketing Act; and milk pooling under the Milk Pooling Act. Indeed, the first of these statutes to be enacted, the Stabilization and Marketing Act,

expressly recognized the integrated relationship between pricing and composition of milk. In defining the purpose of the Marketing Act, the California Legislature declared that:

* * *

> (b) The production and maintenance of an adequate supply of healthful market milk of *proper chemical and physical content*, free from contamination, is vital to the public health and welfare . . .
>
> (c) [T]he potential exists for economic disruption . . . in the production, marketing, and sale of market milk which may constitute a menace to the health and welfare of the inhabitants of this state and may tend to undermine . . . *standards of content* and purity. . . .

Cal. Food & Agric. Code § 61802 (emphasis added).

2. The Section 7254 Exemption Encompasses The Commerce Clause.

Both the Petitioners and the Solicitor General argue that Section 7254 does not exempt the subject matter it governs from the Commerce Clause. *PB* at 4, 23-25; *Brief on the Merits for the United States ("U.S. Brief")* at 10-14. Each relies heavily on the use in Section 7254 of the words "shall be construed" as an indication that Congress did not intend the phrase "this Act or any other provision of law" to include only statutory law and not the Commerce Clause.

Use of the verb "construe" indicates no such thing, however. The common and preferred meanings of "construe" are: "1. to give the meaning or intention of; explain; interpret; 2. to deduce by inference or interpretation; to infer. . . ." RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY (2d ed. 1999). As the Commerce Clause is an affirmative grant of power to Congress to regulate interstate commerce, the proscriptions against interference by states are perforce deduced or inferred from the affirmative grant. Indeed, the Solicitor General concludes that "[t]he Commerce Clause, in contrast, is a structural provision of the Constitution, which is expressly

addressed to the powers of Congress, and which only by implication contains the powers of states." *U.S. Brief* at 26. Thus every dormant Commerce Clause case requires courts to "construe" the Commerce Clause as applied to the facts of the case. Accordingly, the word "construe" does not indicate that Congress intended to exclude the Commerce Clause from the meaning of "any other provision of law" used in Section 7254. Indeed, the more reasonable view is that Congress intended to include the Commerce Clause in its exemption.

Petitioner's assertion that the pairing of the words "this Act" and "any other provision of law" is a "powerful indication" that Congress "had statutory law in mind" is simply *ex cathedra* without support in precedent or logic. At worst, that "pairing" is equally consistent with a Congressional intent to exempt the Commerce Clause as well as statutory law.

The context from which Section 7254 arose strongly suggests that exemption from the Commerce Clause was intended. If one accepts Petitioner's assertion that Congress intended Section 7254 to exempt only California's compositional standards and labeling regulations, the Congressional intent to include the Commerce Clause within the body of law from which these regulations are exempt becomes even clearer. Under provisions of the Nutrition Labeling and Education Act of 1990 ("NLEA"), 21 U.S.C. § 343-1, states were prohibited from adopting standards of identity (i.e., compositional standards) different from federal standards. Other than the NLEA, the only other applicable restriction over which Congress had the power to exempt was the Commerce Clause. Congress' undeniable intent was to allow California to have its own standards of composition of milk and labeling requirements. To permit that, Congress had to exempt California's regulations from two bodies of law, the NLEA and the Commerce Clause.

If Congress had intended the exemption to cover only the provisions of NLEA, it could have so provided. From its use of the term "*any* other provision of law," it is most reasonable to construe Congress' intent to have included the other "provisions of law" that might be applicable - the NLEA and

the Commerce Clause.[16] Since the purpose of the exemption was to allow California regulatory freedom with respect to a product distributed extensively in interstate commerce, failure of the exemption to include the Commerce Clause would render that intent meaningless. True, the statute does not expressly refer to the Commerce Clause or the Constitution, but as the Solicitor General has noted, Congress has not always made specific reference to the Constitution when its intent extended to the Constitution and other sources of law.[17] *U.S. Brief* at 12.

Finally, the Solicitor General suggests that if "any other provision of law" were read to include the Constitution, the exemption would presumably include such Constitutional provisions as the Privileges and Immunities Clause of Article IV and the Equal Protection Clause of the Fourteenth Amendment. Statutes, however, must be interpreted rationally so as to avoid absurdity. Clearly Congress understood that its power to exempt California from the restrictions of Federal law extended to the Commerce Clause but not to Privileges and Immunities or Equal Protection. A Congressional exemption provision must be read to relate only to that which Congress has the power to exempt.

16. Subdivision (b) of 21 U.S.C. § 343-1 provided a means for a state to obtain an exemption from the statute's proscriptions, if, among other things, the U.S. Secretary of Agriculture determined that the state's regulation would not unduly burden interstate commerce. Congress thus clearly had in mind the Commerce Clause when it enacted 21 U.S.C. § 343-1, and in enacting section 7254 must have intended the exemption therein to cover the Commerce Clause.

17. The Solicitor General has referred to a number of federal statutes that refer to the Constitution and "laws" as examples where there was specific reference to the Constitution. *U.S. Brief* at 12 n.3. Interestingly, each statute speaks of the Constitution and "laws," the latter always in the plural. Section 7254 refers to "any other provision of law." This suggests a reference to a larger universe, the body of "law" that might apply to the matters exempted. The Solicitor General also notes the language of Article VI of the Constitution which refers to "[t]his Constitution and the Laws of the United States . . ." presumably to illustrate a distinction made between the Constitution and statutory law. But Article VI goes on to state that together, the Constitution, the Laws of the United States and treaties, "shall be the supreme Law of the Land," thus encompassing the Constitution, statutes and treaties within the meaning of "Law."

B. If The Court Determines That Section 7254 Does Not Apply To The Pooling And Pricing Regulations, The Commerce Clause Issue Need Not Be Decided.

"A fundamental and long-standing principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. N.W. Indian Cemetery Prot. Assoc.*, 485 U.S. 439, 445 (1988). Accordingly, the Court has stated that its "established practice is to resolve statutory questions at the outset where to do so might obviate the need to consider a constitutional issue." *United States v. Wells Fargo Bank*, 485 U.S. 351, 354 (1988). Therefore, if the Court should determine that the exemption granted by Section 7254 does not extend to California's pricing and pooling regulations in general, or, in particular, the 1997 Amendment, the Court does not need to determine whether the subject matters undeniably exempted from Federal statutory provisions—compositional standards and labeling—are also exempt from the Commerce Clause. That question, which touches on the Constitution, need not be reached.

V. Because The 1997 Amendment Does Not Discriminate Against Citizens Of Other States, The Ninth Circuit's Decision Below Should Be Upheld.

Petitioners' claim under the Privileges and Immunities Clause is without merit. The threshold for stating a claim for violation of the Privileges and Immunities Clause is that the challenged regulation is in fact discriminatory. If that threshold is not crossed, a viable claim for violation of the Privileges and Immunities Clause does not exist. As established in Section II.B, supra, the 1997 Amendment does not discriminate against out-of-state milk. Indeed, it continues to provide an incentive that favors the purchase of out-of-state milk by California processors.

Additionally, California's pricing and pooling system does not regulate on the basis of an individual's state of citizenship—either on its face or in practice. As the Solicitor General eloquently states in its brief:

> It is far from clear that . . . a motivating purpose of the California regulations was to place the State's own citizens at an advantage over citizens of other

> State. Nothing in those regulations or any other provision of California law prohibits citizens of other States from owning dairy farms in California, And, when citizens of other States *do* own dairy farms in California, the milk produced at those dairy farms is treated identically to milk produced at California dairy farms owned by California citizens . . . By the same token, all raw milk at dairy farms outside California is treated identically, whether the dairy farm is owned by citizens of California or citizens of other States. Indeed, the Petitioners in this case include a California corporation and two California partnerships (with some or all California partners), which complain about the impact of the California regulations on raw milk produced at the dairy farms that they operate in Nevada.

U.S. Brief at 27-28 n. 8 (citations omitted).

To support their right to press a Privileges and Immunities claim despite the apparent lack of connection between California's pricing and pooling regulations and state citizenship, Petitioners rely on *Chalker v. Birmingham & N.W. Ry.*, 249 U.S. 522 (1919). However, *Chalker* is inapposite here. In *Chalker*, an Alabama resident with his principal office in Alabama challenged a Tennessee law that imposed a higher tax on out-of-state construction companies that did business in Tennessee but had their principal office in another state than on Tennessee construction companies or out-of-state construction companies with their principal place of business in Tennessee. In *Chalker*, the Court struck down the higher tax as impermissibly discriminatory, even though it did not discriminate on the basis of citizenship on its face. The *Chalker* court reasoned that: "We can find no adequate basis for taxing individuals according to the location of their chief offices—the classification, we think, is arbitrary and unreasonable." *Chalker, supra*, 249 U.S. at 527.

Unlike in *Chalker*, an easily discernible and legitimate reason exists for State regulation to distinguish between goods based upon where they are produced, i.e., in-state or out-of-state as States ordinarily must comply with the requirements

of Federal law, including the Commerce Clause.[18] Thus, while *Chalker*'s reasoning may be applicable in the tax context, it is entirely inapplicable in the context of commercial regulation. Accordingly, the Solicitor General is correct when he states that: "It does not follow from *Chalker* that every state law that might have a disparate impact on individuals who are not citizens or residents of the State implicates the Privileges and Immunities Clause, as petitioners at times appear to suggest." *U.S. Brief* at 27.

Because the *Chalker* rationale is not applicable in every context, the Solicitor General's concern that broad application of *Chalker* "would raise serious questions about, and perhaps invalidate, a whole range of *** statutes", (*Id.* at 26 (orig. ellipses), *quoting Washington v. Davis*, 426 U.S. 229, 248), is well-taken. Furthermore, with concerns about the impact of a sweeping application of the *Chalker* rationale in mind, the Solicitor General astutely points out that "intervening developments in the Court's approach to evaluating state laws challenged as discriminatory under the Equal Protection Clause", i.e., the requirement that a law have both a discriminatory purpose and effect to be unconstitutional, may be useful for informing the Court's decision on this issue. *Id.* at 28-29.

CONCLUSION

The decision of the Ninth Circuit should be affirmed as it correctly determined that the challenged 1997 Amendment to the California Pooling Plan was exempted under the provisions of 7 U.S.C. § 7254. Petitioners' arguments concerning the Commerce Clause and the Privileges and Immunities Clause, though not before this Court, are without merit. Should the Court determine contrary to the Ninth Circuit decision that, as a matter of statutory interpretation, section 7254 does not exempt California's minimum producer pricing and pooling laws and regulations in general, or the challenged Amendment in particular, the Court need not and should not make any determination as to whether Congress intended the exemption that was granted extends to challenges under the Commerce Clause.

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18. Notably, the distinction in California's Pooling Plan between "other source" milk, which includes out-of-state milk, predates Section 7254's exemption of the Plan from the strictures of the Commerce Clause.

Respectfully submitted,

JOHN J. VLAHOS
Counsel of Record
S. ANNE JOHNSON
HANSON, BRIDGETT, MARCUS,
VLAHOS & RUDY, LLP
333 Market Street, 23rd Floor
San Francisco, CA 94105
(415) 777-3200
Counsel for Amicus Curiae

APPENDIX A – FEDERAL MILK MARKETING ORDER AREAS, JANUARY 1, 2000

FEDERAL MILK MARKETING ORDER AREAS
January 1, 2000

USDA
Agricultural Marketing Service
Dairy Programs

DIFFERENCES IN SHADING MERELY SERVE TO DIFFERENTIATE BETWEEN MARKETING AREAS

APPENDIX B – CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, MILK POOLING BRANCH, AMOUNT OF QUOTA IN SHIPMENT FOR THE MONTH OF DECEMBER, 2002

PERCENT OF QUOTA IN SHIPMENT
FOR THE MONTH OF DEC, 2002

STATEWIDE

PRODUCTION/QUOTA PERCENT	SOLIDS PRODUCTION	QUOTA SOLIDS	NO OF PRODUCERS	NO AT EQUALIZATION
101 +	1,462,869	2,023,046	40	33
96 - 100	2,825,244	2,771,043	28	22
91 - 95	1,470,161	1,382,155	19	18
86 - 90	4,100,924	3,624,171	34	29
81 - 85	4,385,692	3,676,863	36	31
76 - 80	4,137,800	3,255,709	36	34
71 - 75	7,795,852	5,713,900	50	47
66 - 70	5,700,992	3,896,428	42	38
61 - 65	6,509,757	4,150,399	63	54
56 - 60	7,410,869	4,335,863	56	52
51 - 55	7,602,937	4,071,064	63	56
46 - 50	10,016,952	4,819,656	61	56
41 - 45	10,732,356	4,635,666	69	59
36 - 40	9,938,189	3,796,363	65	61
31 - 35	10,934,885	3,681,998	83	76
26 - 30	12,819,146	3,634,578	90	69
21 - 25	11,486,082	2,727,704	74	52
16 - 20	10,921,757	2,033,831	91	61
11 - 15	11,878,867	1,524,340	101	45
6 - 10	18,109,014	1,588,559	126	41
1 - 5	19,253,260	661,453	111	19
0 -	72,143,689	2,025	646	7
TOTALS:	251,637,294	68,006,814	1,984	960

APPENDIX C – OPERATION OF CALIFORNIA POOLING PLAN

A. Prices Paid To California Farmers.

1. Prior to 1994

The quota allotments granted to California farmers were measured in pounds of the components of milk.[1] Producers were also granted a separate allotment called "production base" equivalent to their historical total production during the selected historical base period. In 1978, additional quota was issued to assist in equalizing returns between producers. Cal. Food & Agric. Code § 62707.1. The Pooling Act and the Pooling Plan also established three revenue equalization pools–a quota pool, a base pool and an overbase pool. Revenues from the sales of raw milk by producers at the various classified prices each month were allocated to each pool: first to the quota pool, then to the base pool and finally to the overbase pool. The revenues were assigned by class, that is, the revenues from Class 1 sales first, Class 2 sales, second, and so on.

The operation of pooling prior to 1994 can best be understood by visualizing the "pools" originally created by the Pooling Act and the Pooling Plan as three side by side containers. The first would be the quota pool. Its size or capacity would be equal to the total number of quota pounds held by all producers. In a given month, all of the revenues from Class 1 sales for the month would be poured into that container. If the number of pounds of such sales did not fill the quota pool container, as was always the case, the revenues for sales of the next lower class or classes in descending order would be poured into the quota pool container until the number of pounds in that pool filled the container's capacity. Then the revenues from the pounds sold of the remaining class or classes, again in descending

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1. As California prices milk on the components thereof, quota was separately allotted for the fat and solids-not fats components.

order, would be poured over into the "base pool" [2] container until the number of pounds in that pool equaled its capacity, measured in pounds. Revenues for the pounds of sales not poured into the quota and base pools went into the overbase pool. Pooling Act §§ 62703, 62707; Pooling Plan §§ 108, 108.5, 200. Then a price for each pool was calculated by dividing the total revenues in that pool by the total pounds in that pool. Pooling Plan §§ 902-904. Since the size of the quota pool in pounds exceeded the number of pounds of Class 1 sales, the revenues of that pool historically included revenues of one or more lower classes, and hence the quota price was really a blend price of revenues from the sales of multiple classes. Generally, except for a few aberrations when market conditions drove the lower class prices higher than the fixed Class 1 price, the Class 1 price exceeded the quota price, and the quota price exceeded the base and overbase prices.

2. Since 1994

In 1993, the California Legislature added sections 62750-62756 to the Pooling Act. Under the new provisions (which became operative commencing 1994) the revenues of sales in all classes, including Class 1, are pooled, separately by the fat and solids-not-fat components, to derive blend overbase prices for each component. As a result, there is established a fats overbase price and a solids overbase price. Then a fixed differential of $1.70 per hundredweight (or $.195 per pound) is added to solids-not-fat overbase price to establish a quota price for solids. Under the 1993 changes, no quota premium is provided for the butterfat component of milk. With a few monthly exceptions, the Class 1 price has exceeded the quota price.[3] The solids quota

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2. The base pool was generally quite small and had a rather insignificant effect on the operation of the pool.

3. In those few instances where the quota price exceeds the Class 1 price, the 1997 Amendment provides the Class 1 plant the same (Cont'd)

price, because of the fixed differential, always exceeds the solids overbase. Pooling Act § 62750; Pooling Plan § 906.

B. Transportation Allowances and Credits.

The prices paid to California farmers are also adjusted by a transportation allowance paid to certain producers and a transportation credit paid to certain processors. Under the Pooling Plan, a few California producers in areas designated as a "supply" areas receive an allowance called the "Transportation Allowance" for shipping milk into areas designated as deficit areas. Pooling Plan §§ 920-923. To encourage shipment by these producers to a more distant Class 1 plant in metropolitan areas rather than to a closer plant the producers receive an allowance to cover the higher transportation costs in order. Only a few California producers receive this allowance, but all California producers pay for it through a deduction of the total cost of these allowances from monthly solids-not-fat revenues before calculating the quota and overbase prices California producers are to receive. Pooling Plan, §§ 906(e)(2)(3), (f) and (g). Likewise, the Stabilization & Marketing Plans provide for transportation credits to plants for interplant shipments of milk. Stabilization & Marketing Plans for both Northern and Southern California § 300.2. Under the Pooling Plan, these credits reduce handlers' pool obligations and are deducted from pool revenues before calculation of the prices to be received by California producers. Pooling Plan §§ 810-814, 906(c)(1), (e)(1). Hence, all California producers pay for the amount of these transportation

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(Cont'd)

credit as prior to the Amendment. Prior to the Amendment, the processor accounted to the pool at Class 1 prices for purchases from out-of-state producers but received a reduction in an equal amount, zeroing its pool obligation. Under Pool Plan section 900(d), added in 1997, a Class 1 plant likewise accounts to the pool for such purchases, but receives a credit for the lower of the in-plant blend price or the quota price. In these few instance, the lower price is the in-plant blend price (which for a Class 1 plant *equals* the Class 1 price), so the processor gets a credit based on that price, again zeroing its obligation to the pool.

credits. However, to determine the credit California processors are to receive for milk purchased from out-of-state sources, the 1997 Amendment enhances the quota price credit by adding these transportation allowances and credits back to the quota price through an additional adjustment called the Pool Price Modification Rate. Pooling Plan, §§ 132, 900(d). Thus, while out-of-state producers have paid nothing for transportation allowances and credits, the pool credit their milk receives, and thus the price they can command, is enhanced by them. The Pool Price Modification Rate exemplifies the painstaking effort taken in the 1997 Amendment to be fair to out-of-state producers.

APPENDIX D – BULK MILK SHIPPED INTO CALIFORNIA POOL PLANTS FROM OUT-OF-STATE SOURCES

Bulk Milk Shipped into California Pool Plants from Out-of-State Sources

Pounds of Milk

Date	Out-of-State (OOS) Milk	CA Milk Production	OOS as % of Total CA Production	Total Solids Production	Total Class 1 Solids	Class 1 % of Total Solids	Total OOS Solids	OOS as % of Total Solids*	OOS as % of Class 1 Solids
Jan-00	44,719,421	2,705,859,000	1.65%	332,838,000	65,098,000	19.56%	*5,518,377*	*1.66%*	*8.48%*
Feb-00	43,404,020	2,555,830,000	1.70%	313,970,000	61,359,000	19.54%	*5,356,056*	*1.71%*	*8.73%*
Mar-00	55,333,211	2,736,425,000	2.02%	335,867,000	66,469,000	19.79%	*6,828,118*	*2.03%*	*10.27%*
Apr-00	49,641,750	2,728,888,000	1.82%	330,926,000	60,123,000	18.17%	*6,125,792*	*1.85%*	*10.19%*
May-00	50,151,090	2,796,218,000	1.79%	337,168,000	64,809,000	19.22%	*6,188,645*	*1.84%*	*9.55%*
Jun-00	48,433,603	2,669,316,000	1.81%	319,327,000	61,463,000	19.25%	*5,976,707*	*1.87%*	*9.72%*
Jul-00	50,800,945	2,781,447,000	1.83%	333,141,000	62,003,000	18.61%	6,160,387	1.85%	9.94%
Aug-00	45,048,766	2,678,687,000	1.68%	322,036,000	64,957,000	20.17%	5,496,778	1.71%	8.46%
Sep-00	43,390,939	2,592,832,000	1.67%	314,563,000	63,601,000	20.22%	5,370,819	1.71%	8.44%
Oct-00	52,458,977	2,679,084,000	1.96%	328,773,000	68,048,000	20.70%	6,506,227	1.98%	9.56%
Nov-00	48,853,223	2,584,905,000	1.89%	320,934,000	65,170,000	20.31%	6,123,924	1.91%	9.40%
Dec-00	49,789,559	2,698,086,000	1.85%	336,786,000	62,758,000	18.63%	6,302,380	1.87%	10.04%
Jan-01	53,402,375	2,748,129,000	1.94%	344,333,000	65,164,000	18.92%	6,770,989	1.97%	10.39%
Feb-01	55,599,770	2,525,791,000	2.20%	315,854 000	59,195,000	18.74%	6,925,607	2.19%	11.70%
Mar-01	74,798,309	2,806,519,000	2.67%	348,761,000	64,909,000	18.61%	9,249,968	2.65%	14.25%
Apr-01	74,571,801	2,783,561,000	2.68%	345,033 000	62,423,000	18.09%	9,157,270	2.65%	14.67%
May-01	77,501,996	2,882,608,000	2.69%	353,451,000	64,709,000	18.31%	9,398,298	2.66%	14.52%
Jun-01	73,426,982	2,780,664,000	2.64%	339,196,000	59,512,000	17.55%	8,891,566	2.62%	14.94%
Jul-01	75,058,000	2,813,385,000	2.67%	343,772,000	63,300,000	18.41%	9,081,942	2.64%	14.35%
Aug-01	69,847,000	2,813,881,000	2.48%	344,134,000	65,266,000	18.97%	8,475,423	2.46%	12.99%
Sep-01	68,474,000	2,705,167,000	2.53%	333,702,000	62,512,000	18.73%	8,335,778	2.50%	13.33%
Oct-01	70,964,000	2,799,787,000	2.53%	348,227,000	67,376,000	19.35%	8,704,329	2.50%	12.92%
Nov-01	69,085,000	2,715,833,000	2.54%	340,431,090	64,513,000	18.95%	8,604,610	2.53%	13.34%
Dec-01	77,926,000	2,807,865,000	2.78%	355,814,883	63,555,843	17.86%	9,816,522	2.76%	15.45%
Jan-02	86,697,000	2,831,984,000	3.06%	359,196,648	66,261,752	18.45%	10,905,097	3.04%	16.46%
Feb-02	87,186,000	2,629,978,000	3.32%	332,093,444	60,238,737	18.14%	10,840,689	3.26%	18.00%
Mar-02	102,232,000	2,981,647,000	3.43%	374,657,114	65,135,499	17.39%	12,626,325	3.37%	19.38%
Apr-02	101,109,000	2,933,326,000	3.45%	364,794,785	64,325,532	17.63%	12,351,855	3.39%	19.20%
May-02	110,115,000	3,069,832,000	3.59%	381,861,433	66,946,643	17.53%	13,440,757	3.52%	20.08%
Jun-02									
Jul-02									
Aug-02									
Sep-02									
Oct-02									
Nov-02									
Dec-02									

*Jan 00 to June 00 O-O-S solids estimated using average of 12.34% solids as calculated using July 00-Dec 01 data.

Source: CDFA